IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5685

DAISY JOHNSON, DOROTHY MILLER, FORESTINE PRESSY, individually and on behalf of their minor children and on behalf of all others similarly situated,

Plaintiff-Appellants,

—against—

NEW YORK STATE EDUCATION DEPARTMENT, EWALD B. NYQUIST, as Commissioner of the New York State Education Department, and the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead,

Defendants-Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
September 16, 1970	Plaintiffs' Complaint filed in United States District Court for the Eastern District of New York and Summons Issued
September 22, 1970	Order to Show Cause—Ordered that Defendants show cause in Courtroom No. 9 on September 25, 1970 at 10:00 A.M. why a Temporary Restraining Order should not issue pending the Hearing of Plaintiffs' Motion for a Preliminary and Permanent Injunction. Travia, J.
September 22, 1970	Plaintiffs' Memorandum of Law in support of their Motion
September 25, 1970	Affidavit of CARL JAY NATHANSON in support of Plaintiffs' Motion
September 28, 1970	Affidavit of DONALD J. SUSKIND in opposition to Plaintiffs' Motion
September 28, 1970	Affidavit of EDWARD MOYER in opposition to Plaintiffs' Motion
September 30, 1970	Memorandum of Defendants NEW YORK STATE EDUCATION DEPARTMENT and EWALD B. NYQUIST in opposition to Plaintiffs' Motion to Convene a Three-Judge Court.
October 7, 1970	Supplemental Memorandum of Law on behalf of Defendant NEW YORK STATE EDUCATION DEPARTMENT and EWALD B. NYQUIST

DATE	PROCEEDINGS
October 9, 1970	Summons and return. Defendants NEW YORK STATE EDUCATION DEPARTMENT and EWALD B. NYQUIST served on 9/22/70; Defendants BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 27 served on 10/7/70
October 10, 1970	Answer of Defendants BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 27 and EDWARD MOYER, Superintendent, filed
October 13, 1970	Plaintiffs reply Memorandum of Law filed in support of Application to Convene a Three-Judge Court.
October 28, 1970	Memorandum decision and Order, Travia, J. Ordered Plaintiffs' Motion is in all respects denied and that the Complaint be dismissed
November 5, 1970	Plaintiffs' motion for Leave to Appeal in Forma Pauperis
November 5, 1970	Plaintiffs' Notice of Appeal filed
November 20, 1970	Order entered granting Plaintiffs Leave to Appeal in Forma Pauperis. Travia, J.
June 16, 1971	Appeal argued. Kaufman, C.J., Moore, J. Timbers, J.
August 13, 1971	Opinion and Dissenting Opinion and Judgment of the Court of Appeals for the Second Circuit
November 6, 1971	Petition for Certiorari filed
November 12, 1971	Certified Record on Appeal to the United States Supreme Court
February 22, 1972	Certiorari granted

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

COMPLAINT

I

Plaintiffs, on behalf of themselves and all other persons similarly situated, seek a declaratory judgment that New York Education Law, Section 701 is in violation of the Fourteenth Amendment to the Constitution of the United States insofar as said section has the effect of denying plaintiffs equal protection of the law.

Plaintiffs seek to enjoin any action under the aforesaid Statute which denies free text-books to all the pupils in Union Free School District No. 27 in grades one to six, while providing free text-books to all pupils in grades seven to twelve.

II

PRELIMINARY STATEMENT

In 1965, the New York State Legislature, amended Section 701 of the Education Law (Laws 1965, c. 320) to require local public school authorities to lend text-books free of charge to all pupils in grades seven through twelve. No such automatic provision of free text-books is made for children in grades one through six. Instead, § 703 authorizes the qualified voters of local school districts to vote a tax, and if voted, requires the local school board to purchase and furnish free, text-books to all pupils in grades one through six attending the schools in said district. The Legislature enacted the above provision based on findings that "public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state." (New York Sessions Laws, 1965, c. 320 § 1).

The Board of Education of Union Free School District No. 27, Town of Hempstead, following rejection by the voters of the proposed 1970-1971 school budget, notified the plaintiffs and other parents that pupils in the ele-

mentary schools would have to pay a fee for text-books, work-books, duplicating paper, miscellaneous supplies and materials. Each child in grades 1, 2, 3, and 4, $17.50; and each child in grades 5 and 6, $15.50. Text-books have been distributed free to pupils in grades seven through twelve. Children unable to pay the text-book fee have been denied text-books and supplies by the West Hempstead Public Schools.

Section 701 of the Education Law is in violation of the equal protection provisions of the Fourteenth Amendment to the United States Constitution and causes serious and irreparable harm to plaintiffs' children and all other children similarly situated. Specifically, as hereinafter more fully set forth, the New York Education Law unreasonably, irrationally and arbitrarily creates two classes of pupils, those in grades seven to twelve who will receive free text-books and those pupils in grades one through six who, absent approval of a tax by voters in the district, must pay for text-books. Under the New York Law, the only distinction between the pupils who receive free text-books and those who must pay for text-books is the grade of the pupil. The classification is without any reasonable basis and denies equal educational opportunity to pupils in grades one through six unable to purchase text-books. Likewise, the arbitrary conditioning of plaintiffs' children's right to text-books upon approval by a local tax assessment vote, while providing text-books automatically to other children, is invidious and a denial of equal protection of the law.

As implemented, the Education Law specifically permits and authorizes the requirement of a fee for text-books levied by local school districts upon parents of children in grades one through six. Plaintiffs, recipients of public assistance, are indigent and cannot pay that fee. Their children are hence being denied essential text-books, which are nonetheless available to other similarly situated but more wealthy children, and hence receive a significantly inferior education solely because of plaintiffs' indigency. As such, plaintiffs are hence denied equal protection of the laws.

III

JURISDICTION

The jurisdiction of the Court is based upon:

a) Title 28 U.S.C. §§ 1331, 1337 and 1343

b) Title 28 U.S.C. §§ 2201 and 2202

c) Title 42 U.S.C. §§ 1983 and 1988

d) United States Constitution, the Fourteenth Amendment.

The amount in controversy, exclusive of interests and cost, exceeds $10,000.00.

IV

THREE JUDGE COURT

A three judge District Court is required to be convened pursuant to Title 28 U.S.C. §§ 2281 and 2284 in that plaintiffs seek a permanent injunction restraining the enforcement, operation and execution of New York Education Law § 701, *et seq.* by the defendants by reason of its repugnance to the Constitution of the United States.

V

STATEMENT OF CLAIM

1. New York State in its Constitution mandates that "The Legislature shall provide for the maintenance and support of a system of free common schools wherein all the children of this state may be educated." New York Constitution, Art. XI, § 1. Attendance of "minors from six to sixteen years of age" upon full time day instruction is compulsory. New York Education Law 3205.

2. Pupils over five and under twenty-one years of age are entitled to attend the public schools in the district or city of their residence without the payment of tuition. New York Education Law § 3202, subdivision 1.

3. In 1965, the New York Legislature amended § 701 of the Education Law of the State of New York and required local school districts, beginning with the year 1966-1967, to purchase text-books and lend them without charge "to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law." New York Education Law § 701, subdivision 1, 2, and 3, provides as follows:

> "1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.
>
> 2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.
>
> 3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the *power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books.* Text-books loaned to children in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities." (Emphasis added).

4. The qualified voters of any school district shall have the power to vote a tax for the purchase of text-books used by pupils enrolled in grades one to six inclusive.

The New York Education Law, § 703, subdivision 2, provides as follows:

> "If such tax shall be voted, it shall be the duty of the board of education or trustees of such district, within ninety days thereafter, to purchase and furnish free, text-books to all the pupils in grades one through six inclusive attending the schools in such district. Such board of education or trustees shall have power to establish such rules and regulations concerning the use by the pupils of such text-books, and the care, preservation and custody thereof as it shall deem necessary. L. 1947, c. 820; amended L. 1950, c. 239, § 3; L. 1965, c. 320, § 3, eff. Sept. 1, 1966."

5. In June, 1970, the qualified voters of Union Free School District No. 27, commonly referred to as the West Hempstead Public Schools, rejected the school budget which included provision of text-books to children in grades one through six.

6. On August 31, 1970, the defendant school board, by letter, a copy of which is annexed as Exhibit "A", notified the plaintiffs and other parents that the defendant school board would be operating on an austerity budget and that all pupils in grades kindergarten to 6th grade would have to pay for text-books, work-books and other school materials. A copy of the schedule of fees is annexed and marked Exhibit "B".

7. The fees for text-books per pupil in the elementary school are as follows:

	Text-books Per Pupil (rental)
Grades 1, 2, 3, 4	$7.50
Grades 5, 6	7.50
Grades 7, 8, 9, 10, 11, 12	Free

8. The fees were due and payable on the first day of school. Children who did not bring the fees demanded were denied text-books, work-books and other required materials.

9. The defendant School Board, pursuant to the provisions of the Education Law, § 701, provided free text-books to all pupils in grades seven through twelve on the first day of school.

10. The provisions of New York Education Law, § 701 is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that the State has arbitrarily and unreasonably created two classes of pupils, those in grades seven to twelve, who will receive free text-books, and those in grades one through six, who must pay for text-books. That text-books, which are critical to the teaching process, are denied to children whose need is equal to those in grades seven to twelve but whose parents are unable to pay the requisite fee. Unless this Court declares the aforementioned provisions unconstitutional and enjoins implementation thereof, the pupils attending first to sixth grades, who lack funds to purchase text-books, suffer permanent and irreparable damage by being denied an education.

VII

PLAINTIFFS

(1) (a) Plaintiffs are all adult citizens of the United States and reside in Nassau County within Union Free School District No. 27, in the Town of Hempstead. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their own behalf and on behalf of their children and all other persons similarly aggrieved by the implementation of New York Education Law § 701.

(b) Plaintiffs are members of a class of recipients of public assistance who are parents of children attending defendant School Board's school in the first to the sixth grades and who have been denied free text-books which have been provided free by said board to pupils in grades seven to twelve and who are now denied any text-books because of their indigency.

(c) Plaintiffs bring this action as a class action because the questions of fact and law are common to the

plaintiffs and the class they represent; the members of the class are so numerous as to make joinder of parties impracticable; the claims of the plaintiffs are typical of the claims of all members of the class; the plaintiffs fairly and adequately represent the claims of all the members of the class, and class action will best provide for a fair and efficient adjudication of this controversy.

(2) (a) Plaintiff DAISY JOHNSON is a recipient of public assistance and resides in the Town of Hempstead, New York. She is the mother of four children attending the West Hempstead Public Schools. Herron Johnson, age 8, is in the third grade at the Marion Deloney Primary School; Reberick Johnson, age 6, is in the second grade at the same school; Roderick Johnson, age 5, is in the first grade at the Deloney Primary School and Zena Johnson, age 5, is in the kindergarten at the Chestnut Primary School. All the children were denied free text-books by the defendant School Board and asked instead to pay a fee for rental of the required books, totaling $58.50. The plaintiff DAISY JOHNSON lacks funds to purchase said text-books and the children are without text-books required for their daily instruction.

(b) Plaintiff DOROTHY MILLER is a recipient of public assistance and resides in the Town of Hempstead, New York. She is the mother of Sheshonia Miller, age 5, who attends kindergarten at the Marion Deloney Primary School. On the first day of school she was denied free text-books by the defendant board and instead was asked to pay a fee of $6.00. She does not have the fee demanded and is without the text-books required for daily instruction.

(c) Plaintiff FORESTINE PRESSY is a recipient of public assistance and resides in the Town of Hempstead, New York. She is the mother of Paulette Pressy, age 6½, who attends the second grade at the Deloney Primary School. On the first day of school Paulette was denied free text-books and asked to pay a rental fee of $17.50. She was unable to pay the fee and denied the text-books required for instruction.

VIII

DEFENDANTS

(1) The defendant NEW YORK STATE EDUCATION DEPARTMENT, under New York Education Law § 101, has primary responsibility for the general management and supervision of all public schools and all of the educational work of the State of New York in accordance with the Education Law of New York, and the Constitutions of New York and the United States.

(2) Defendant EWALD B. NYQUIST, as Commissioner of the New York State Department of Education, has primary responsibility for the supervision over all schools and advises and guides the school officers of all districts in relation to their duties and management of schools under their control. As the Chief Executive Officer of the State system of education, he is under a duty to enforce all general and special laws relating to the educational system of the State of New York. *Education Law § 305.*

(3) Defendant BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 27, Town of Hempstead, is a corporate body responsible for the required instruction of pupils residing in its district and has the supervision, management and control of the educational affairs of the district. *Education Law § 1709.*

(4) Defendant EDWARD MOYER, as Superintendent of the schools in Union Free School District No. 27, Town of Hempstead, is the Chief Executive Officer of the school district and has primary responsibility for the administration of the schools in compliance with law. *New York Education Law § 1711.*

IX

AS A FIRST CAUSE OF ACTION

1. Section 701 of the Education Law violates and is repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. By

requiring free text-books to those pupils in grades seven to twelve and denying free text-books to pupils in grades one to six, § 701 invidiously discriminates against plaintiffs and all others similarly situated, by creating an arbitrary irrational and discriminatory classification which deprives plaintiffs and members of their class of equal protection of law and an adequate education.

X

AS A SECOND CAUSE OF ACTION

1. Plaintiffs restate and reallege each and every allegation contained in Sections I-VIII, *ante*.

2. Under the Constitutions of the United States and the State of New York, the right to education is fundamental to every citizen's opportunity in life and includes all essential materials recognized by the State as being basic to learning.

3. A necessary component of education is the furnishing of text-books to all children. Without such text-books, a child's participation in the school curriculum, class discussion and academic activities is severely handicapped and irreparably impaired.

4. Under the Education Law, §§ 701 and 703, educationally required text-books are furnished automatically to all children except those in grades one through six. Such younger children's basic right to books necessary for education is subjected to the arbitrary condition of a local school district tax assessment vote, while no such condition is imposed on older children's right to needed books.

5. The imposition of the special procedural requirement of obtaining a majority of voters' approval in a local school district tax assessment vote in order to receive text-books without charge while all other school age children receive text-books automatically free of charge, is a denial of equal educational opportunity and equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

XI

AS A THIRD CAUSE OF ACTION

1. Plaintiffs restate and reallege each and every allegation contained in Sections I-VIII, *ante*.

2. Pursuant to the aforesaid statutory provisions of the Educational Law, text-books, recognized by the State as essential to obtaining a decent education, are provided to plaintiffs' children in grades one through six only upon payment of a designated fee.

3. As indigent parents with a basic public assistance grant which includes no allowance for school books, plaintiffs are unable to afford to pay this fee and their children are forced to accept text-book-less education.

4. Plaintiffs' children are by definition educationally deprived due to their poverty and, therefore, least able to survive with injury and such deprivation when it is imposed upon them.

5. In providing the basics of education only to those children who can afford to pay the fee charged, and in withholding them from children unable to pay because of indigency, defendants are denying plaintiffs equal educational opportunity and equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

XII

Text-books are the structural backbone to classroom learning in school. No rational purpose exists for the implemented statutory discrimination which denies these books to children in grades one through six:

(a) Such younger children have an equal or greater need for educational materials, most critically text-books, as do their older counterparts who are similarly situated, in seeking education. Mere longevity or level of sophistication in reading bear no relation to a child's actual need for text-books. Early exposure to written materials is vital to later development. Without text-books, plaintiffs' children, in their formative years, are falling behind, and will continue to fall behind, other children who are

ERRATA - PAGE 13 APPENDIX

2. Enter preliminary and permanent injunctions enjoining the defendants, their successors in office, agents and employees, from enforcing or implementing New York Education Law §701 insofar as it denies free text-books to those pupils in first through sixth grades, while requiring free text-books for pupils in grades seven to twelve, on the ground that said classification is arbitrary, irrational and discriminatory in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

now being provided them or who are able to afford them. Should text-book deprivation continue to be visited upon the younger children in early years of development, by the time grade seven is reached, the prior impairment of reading, writing and comprehension skills will render useless and meaningless their then acquired right to seventh grade text-books. Provision, then, of seventh grade text-books to children learning at fifth grade levels because of prior text-book deprivation is irrational, invidious, and cruel in the extreme.

(b) Indigent children sitting, bookless, side by side in the same classroom with other more wealthy children learning with purchase text-books engenders a widespread feeling of inferiority and unfitness in poor children and is psychologically, emotionally and educationally disastrous to their well-being.

Plaintiffs have no adequate remedy at law. Defendants will continue to cause, and threaten to cause, irreparable injury unless enjoined forthwith.

WHEREFORE, plaintiffs, on behalf of themselves and all others similarly situated, respectfully pray:

1. That a three judge District Court be convened to determine this controversy pursuant to Title 28 U.S.C., §§ 2281 and 2284.

2. Enter preliminary and permanent injunctions enjoining the defendants, their successors in office, agents and employees, from enforcing or implementing New York Education Law, § 701 insofar as it denies free text-books to those pupils in grades seven to twelve, on the ground that said classification is arbitrary, irrational and discriminatory in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

3. Enter a declaratory judgment declaring New York Education Law, § 701, *et seq.* unconstitutional in violation of the Fourteenth Amendment to the United States Constitution.

4. Allow plaintiffs their costs herein and grant them and all other persons similarly situated such additional

or alternative relief as the Court may deem to be just and appropriate.

Respectfully submitted,

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IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE—RE: Preliminary and Permanent Injunctions and Convening of a Statutory Three-Judge Court

Upon the affidavits of Daisy Johnson, Dorothy Miller, Forestine Pressy and Carl Jay Nathanson dated September 14, 1970, LET defendants show cause in Courtroom No. 9, of the United States Courthouse, 225 Cadman Plaza, Brooklyn, New York, on the 25 day of September, 1970, at 10 a.m. or as soon thereafter as Counsel can be heard why an order should not issue granting plaintiffs herein the following relief:

1. A preliminary and permanent injunction restraining and enjoining defendants, their successors in office, agents and employees and all persons in active concert and participation with them, from enforcing and implementing the provisions of New York Education Law § 701 insofar as said provisions deny free textbooks to pupils in grades one to six.

2. A declaratory judgment that New York Education Law § 701, insofar as it requires the distribution of free textbooks to these pupils in grades seven to twelve while denying free textbooks to those pupils in grades one to six creates an arbitrary, irrational and unreasonable classification thereby denying equal protection of laws to pupils in grades one to six in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. The convening of a statutory three judge District Court for the purpose of hearing and determining this application for the preliminary and permanent injunction in accordance with the provisions of Title 28 United States Code §§ 2281 and 2284.

4. An order determining that this action may properly proceed as a class action pursuant to Rule 23 of the Federal Rule of Civil Procedure.

Let the defendants further show cause why a temporary restraining order pursuant to Title 28 of the United States Code § 2284 should not issue restraining the de-

fendants from enforcing and implementing the provisions of New York Education Law § 701 insofar as it requires the distribution of free textbooks to those pupils in grades seven to twelve while denying free textbooks to pupils in grades one to six, pending the hearing and determination of plaintiffs motion for a preliminary and permanent injunction on the grounds that:

1. Enforcement of the provisions of New York Education Law § 701 results in a denial of equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.
2. Plaintiffs children in grades one to six are suffering immediate and irreparable harm by being deprived of textbooks required for daily instruction and which are both critical and essential to proper educational development.
3. The issuance of a temporary restraining order and preliminary injunction will prevent irreparable injury to plaintiffs and will not cause undue inconvenience or loss to defendants.
4. Plaintiffs have no adequate remedy at law.

IT IS ORDERED that service of this Order and its accompanying papers on defendant NEW YORK STATE EDUCATION DEPARTMENT and EWALD B. NYQUIST, as Commissioner of the New York State Department of Education; the defendant UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead, by service on the school district clerk, and on defendant EDWARD MOYER, as Superintendent of the Union Free School District No. 27, Town of Hempstead, New York, on or before the 18 day of September, 1970 be deemed sufficient.

It is further ordered that service of this Order may be made by any of the attorneys for the plaintiff.

At the United States Courthouse,
225 Cadman Plaza, Brooklyn, New York,
this 16 day of September, 1970.

/s/ ANTHONY J. TRAVIA
United States District Judge

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CARL JAY NATHANSON IN SUPPORT OF ORDER TO SHOW CAUSE

CARL JAY NATHANSON, being duly sworn, deposes and says:

1) I am an attorney with the Nassau County Law Services Committee, Inc., attorney for the plaintiffs herein and I make this affidavit in support of the instant order to show cause containing 1) an application for a preliminary and permanent injunction restraining defendants from enforcing the provisions of New York Education Law, § 701, insofar as said provisions denies free text-books to pupils in grades one to six, and 2) an application for the convening of a statutory three judge District Court.

2) New York Education Law § 701, subdivision 3, enacted in 1965, requires that text-books be loaned free to children enrolled in grades 7 through 12 of public schools or of private schools which satisfy the compulsory attendance requirements.

3) Section 701, subdivision 3, provides as follows:

> "3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

4) There is no corresponding provision under the Education Law requiring that text-books be loaned free to children enrolled in grades one to six in public or private schools which satisfy the compulsory attendance requirements. Education Law, § 703 authorizes qualified voters of any school district to vote a tax for the purchase of text-books and if a tax be voted the school district shall purchase and loan text-books free to all the pupils in grades one to six in the school district. Section 703 provides:

> "1. The qualified voters of any school district present at any annual school meeting or at any special school meeting duly and legally called for that purpose, shall have power, by a majority vote, to be ascertained by taking and recording the ayes and noes, to vote a tax for the purchase of all text-books used, or to be used, by pupils enrolled in grades one to six, inclusive, in the schools of the district.
>
> 2. If such tax shall be voted, it shall be the duty of the board of education or trustees of such district, within ninety days thereafter, to purchase and furnish free, text-books to all the pupils in grades one through six inclusive attending the schools in such district. Such board of education or trustees shall have power to establish such rules and regulations concerning the use by the pupils of such text-books, and the care, preservation and custody thereof as it shall deem necessary."

5) In June, 1970, the qualified voters of Union Free School District No. 27, Town of Hempstead, New York, commonly referred to as the West Hempstead Public Schools, rejected the proposed 1970-1971 school budget.

6) The qualified voters of the school district also voted against a tax for the purchase and loan of text-books free to the pupils in grades one to six of the school district.

7) In August, 1970, the defendant school board notified the plaintiffs and other parents of school children in the district that pupils in grades seven to twelve would be loaned text-books free of charge, while pupils

in grades kindergarten to six would be required to rent text-books at a cost of $7.50.

8) Plaintiffs DAISY JOHNSON, DOROTHY MILLER and FORESTINE PRESSY, are parents of pupils in grades one to third, attending public schools in the defendant Board of Education's school district. The plaintiffs are recipients of public assistance from Nassau County and have been receiving public assistance for more than two years in the Aid to Families with Dependent Children program (AFDC) of the Social Security Act. In March 1969, the New York Legislature (Laws of 1969, Ch. 184 as amended by Ch. 411, amending § 131—a New York Social Services Law) radically altered the approach to public assistance payments by eliminating all payments for special needs designated as "special needs grants" and adopting a system fixing maximum allowances per family. The plaintiffs are without funds to enable them to purchase the text-books for their children's required daily instruction. Plaintiffs' children are without text-books and have been denied free text-books by defendant school board and are unable to rent text-books.

9) On Thursday, September 10, 1970, deponent telephoned Mr. Edward Moyer, Superintendent of Public Schools of West Hempstead and informed him that the parents of children in the school district receiving public assistance were unable to pay the fees demanded by the school board for rental of required text-books and were thus being deprived of text-books by the imposition of the rental fees. Mr. Moyer expressed compassion for the plaintiffs' plight and informed deponent that only the pupils in grades one to six were required by the Education Law, and in the absence of the voter's approval of a tax for the purchase and free loan of text-book the board was required to extract a rental charge. Pupils in grades seven to twelve, he stated, by law, must receive free text-books. No special provision could be made for children who were without funds to pay the rental charges.

10) Plaintiffs' children and all other children in grades one to six have been denied free text-books critical to

their right in New York State to receive an adequate education by reason of the provisions of Education Law, Section 701. The classification of pupils who are to receive free text-books in New York State and those who must pay for them, is arbitrary, irrational and without any constitutionally permissable purpose. The provisions of Education Law § 701, deny plaintiffs, and all other persons similarly situated, equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution. The invidious classification denies pupils in grades one to six their fundamental rights to be educated by permitting their right to receive free text-books to be subject to the will of the voters of the district while mandating free text-books for pupils in grades seven to twelve. As such, the statutory scheme effects severe discriminations whereby poor children in their formative years, so critical to early development and later opportunity in life, are denied text-books—the very pillars of classroom learning. Such textbooks are available free of charge to older children and are provided even now to younger children with parents of means sufficient to pay defendants' fee. This discrimination is imposed in three respects as set forth in the claims contained in plaintiffs' complaint. No rational basis exists for providing free text-books to children in grades seven through twelve while denying them to children in grades one through six, (First Cause of Action), nor for subjecting the younger children's right to receive text-books free of charge to a local school district tax assessment vote while issuing text-books automatically to all other children in higher grades. (Second Cause of Action). Mere longevity or greater sophistication in reading are wholly arbitrary and invidio criteria used to deprive those most in need of reading aids. Likewise making a child's ability to obtain a decent education dependent and contingent upon his parent's pocketbook, and it surely can be said that text-book-less learning is *indecent* education, bears no relation to the purpose of the law challenged, that of providing a free public education to all children.

The Supreme Court in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) held that welfare residency requirements were an invidious classification which violated the equal protection of the law provision of the Fourteenth Amendment to the United States Constitution. The Court rejected the contention that the classification was permissable because it was compelled by the state's desire to preserve fiscal integrity. The instant classification is similarly without compelling state interest.

11) No previous application for the relief requested has been made to this or any other Court.

WHEREFORE plaintiffs ask that the following relief be granted:

1. A preliminary and permanent injunction restraining and enjoining defendants, their successors in office, agents and employees and all persons in active concert and participation with them, from enforcing and implementing the provisions of New York Education Law § 701 insofar as said provisions deny free text-books to pupils in grades one to six.

2. The convening of a statutory three judge District Court for the purpose of hearing and determining this application for the preliminary and permanent injunction in accordance with the provisions of Title 28 United States Code §§ 2281 and 2284.

3. An order determining that this action may properly proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

(Sworn to by CARL JAY NATHANSON,
September 14, 1970)

IN UNITED STATES DISTRICT COURT

Affidavit of Daisy Johnson

DAISY JOHNSON, being duly sworn deposes and says:

1. I am over twenty one years of age, am a citizen of the United States and reside in Nassau County, Town of Hempstead, State of New York together with my four infant children.

2. For the past two years we have received public assistance from the Nassau County Department of Social Services in the Aid to Families with Dependent Children program.

3. We reside within Union Free School District No. 27, Town of Hempstead, New York commonly known as the West Hempstead public school district.

4. All my children attend the public schools of the West Hempstead school district. My son Herron age 8 attends third grade at the Chestnut School; my son Reberick age 6 attends the second grade; my son Roderick age 5 attends the first grade and my daughter Zena attends Kindergarten classes at the Marion M. Delaney School.

5. On or about August 31, 1970, I received a letter from the defendant school board informing me that all children in grades kindergarten to six would be required to pay a rental charge for the loan of textbooks. Last year my children and all other children were loaned textbooks without charge. (A copy of the letter is annexed hereto as Exhibit A). In addition the school board no longer provides bus transportation for the children and I must walk with the four children more than a mile twice a day or pay more than $40 a month for public transportation. I receive no allowance for this expense.

6. On the first day of school, September 9, 1970 my childrens' teachers distributed textbooks to all pupils who paid the rental charge. I am unable to pay the rental charge and my children have been denied textbooks required for their daily instruction.

7. I have been informed by my attorney that at my request he telephoned the Superintendent of schools to inform him of my inability to pay for the rental of books and that he was told the board was complying with Section 701 and 703 of the Education Law, which in the absence of voter approval required them to loan books free to pupils in grades seven to twelve and rent books to pupils in grades one to six.

8. The textbooks are necessary for my children to obtain a decent education and they will be irreparably harmed if they are forced because of my poverty to continue without school books.

9. My caseworker has informed that she cannot help me because she cannot issue a special grant for either transportation or books under the New York Social Services Law.

10. I respectfully ask this Court to grant the relief as requested.

/s/ DAISY JOHNSON
DAISY JOHNSON

(Sworn to by DAISY JOHNSON, September 14, 1970.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DOROTHY MILLER

DOROTHY MILLER, being duly sworn deposes and says:

1. I am over twenty one years of age, am a citizen of the United States and reside in Nassau County, Town of Hempstead, State of New York together with my three infant children.

2. For the past two years we have received public assistance from the Nassau County Department of Social Service in the Aid to Families with Dependent Children program.

3. We reside within Union Free School District No. 27, Town of Hempstead, New York commonly known as the West Hempstead public school district.

4. My daughter Sheshonia age 5 attends first grade at the Marion M. Delaney School.

5. On or about August 31, 1970, I received a letter from the defendant school board informing me that all children in grades kindergarten to six would be required to pay a rental charge for the loan of textbooks. Last year my child and all other children were loaned textbooks without charge. (A copy of the letter is annexed hereto as Exhibit A.) In addition the school board no longer provides bus transportation for the children and I must walk with my daughter more than a mile twice a day or pay $12 monthly for public transportation. I receive no allowance for this expense.

6. On the first day of school, September 9, 1970 my child's teacher distributed textbooks to all pupils who paid the rental charge. I am unable to pay the rental charge and my child has been denied textbooks required for her daily instruction.

7. I have been informed by my attorney that at my request he telephoned the Superintendent of schools to inform him of my inability to pay for the rental of books and that he was told the board was complying with Section 701 and 703 of the Education Law, which in the absence of voter approval required them to loan

books free to pupils in grades seven to twelve and rent books to pupils in grades one to six.

8. The textbooks are necessary for my child to obtain a decent education and she will be irreparably harmed if she is forced because of my poverty to continue without school books.

9. My caseworker has informed me that she cannot help me because she cannot issue a special grant for either transportation or books under the New York Social Services Law.

10. I respectfully ask this Court to grant the relief as requested.

/s/ DOROTHY MILLER
DOROTHY MILLER

(Sworn to by Dorothy Miller, September 14, 1970)

IN UNITED STATES DISTRICT COURT

Affidavit of Forestine Pressy

FORESTINE PRESSY, being duly sworn deposes and says:

1. I am over twenty one years of age, am a citizen of the United States and reside in Nassau County, Town of Hempstead, State of New York together with my four infant children.

2. For the past two years we have received public assistance from the Nassau County Department of Social Services in the Aid to Families with Dependent Children program.

3. We reside within Union Free School District No. 27, Town of Hempstead, New York commonly known as the West Hempstead public school district.

4. My daughter Paulette age 6½ attends second grade at the Marion M. Delaney School.

5. On or about August 31, 1970, I received a letter from the defendant school board informing me that all children in grades kindergarten to six would be required to pay a rental charge for the loan of textbooks. Last year my child and all other children were loaned textbooks without charge. (A copy of the letter is annexed hereto as Exhibit A.) In addition the school board no longer provides bus transportation for the children and I must walk with my daughter more than a mile twice a day or pay $12 monthly for public transportation. I receive no allowance for this expense.

6. On the first day of school my daughter asked her teacher for textbooks and was told that she would have to bring money from her mother to obtain textbooks. My daughter asked me upon her return from school why some children in her class were given books, and I told her, that the parents of those children were able to pay for the textbooks. I told my daughter that I would try to get the books for her. I have asked my caseworker for help, but she said there was nothing she could do. In addition, the school board no longer provides free bus transportation, and I must pay for public transporta-

tion to carry my child to the school which is more than twenty blocks away from our home.

7. I have been informed by my attorney that at my request he telephoned the Superintendent of schools to inform him of my inability to pay for the rental of books and that he was told the board was complying with Section 701 and 703 of the Education Law, which in the absence of voter approval required them to loan books free to pupils in grades seven to twelve and rent books to pupils in grades one to six.

8. The textbooks are necessary for my child to obtain a decent education and she will be irreparably harmed if she is forced because of my poverty to continue without school books.

9. My caseworker has informed me that she cannot help me because she cannot issue a special grant for either transportation or books under the New York Social Services Law.

10. I respectfully ask this Court to grant the relief as requested.

/s/ FORESTINE PRESSY
FORESTINE PRESSY

(Sworn to by FORESTINE PRESSY
September 14, 1970)

IN UNITED STATES DISTRICT COURT

Affidavit of Carl Jay Nathanson

CARL JAY NATHANSON, being duly sworn, deposes and says:

I am an attorney with the Nassau County Law Services Committee, Inc., attorney for the plaintiffs, and make this affidavit in support of an application for a temporary restraining order pending the hearing of the application for the convening of a statutory three judge court.

More than two weeks have elapsed since the start of the 1970-71 school term and plaintiffs' children in attendance in grades one to six remain text-book less and unable to pay the rental fee.

The denial of text-books to plaintiffs' children who sit in classrooms with children who have textbooks, has and continues to harm the plaintiffs' children by generating a feeling of inferiority as to their status in the class that may effect their hearts and minds in a way unlikely ever to be done. Being denied text-books so critical to education (see affidavit of Dr. Gerald G. Glass) while other classmates have text-books retards the educational and mental developemnt of plaintiffs' children.

Each day the plaintiffs' children and all other children in grades one to six without text-books are subjected to harsh and intolerable pressures by the teachers which include the following: (a) Herron Johnson, age 8, attends the third grade. Each day he is told that he will receive an "F" for the day because he is without the required text-books. When the other pupils in the class read from text-books, the teacher doesn't let him share a book with another pupil, instead she gives him paper and tells him to draw. (b) Reberick Johnson, age 6, attends the second grade; when his teacher, Mrs. Levinson, gives out reading books to the children who have paid the rental charge, Reberick says, "I don't get it like everyone else." Each day he is told he is the only one in the class without books. (c) Paulette Pressy,

age 6½, attends the second grade; she has been repeatedly told by Mrs. Zimmer, her teacher, "No money, no books". Paulette says when the other children read from their books, the teacher, "gives me paper to draw on".

This Court is authorized to issue in its discretion a Temporary Restraining Order pending the convening of the three judge court where irreparable harm would otherwise result to plaintiffs. 28 U.S.C. 2284(3). *Traffic Telephone Workers Federation of New Jersey*, 71 F. Supp. 681 (D. N. J. 1947). The issues raised by plaintiffs need merely be "justifiable" and the threat of irreparable injury real in order for a temporary order to issue. Even pending the determination of plaintiffs' instant motion for convening of a statutory three judge court, a temporary restraining order is warranted where the plaintiffs have raised "serious, substantial and difficult" issues, and shown a "reasonable possibility of success". *G.B.C. Inc.* v. *United States*, 302 F. Supp. 1283 (E.D. Term 1969). Where a probability of success is shown, and the harm to plaintiffs without the injunction is greater than the harm caused to the defendants by the issuance of the injunction, the Court may and should provide temporary relief. See *Clairol Incorporated* v. *Gillette Company*, 389 F. 2d 264 (2d Cir. 1968); *Unicorn Manufacturing Corp.* v. *Koppers Company*, 366 F. 2d 199, 204 (2d Cir. 1966); *Dino de Laurentiis Cinematographica, S.p.A.* v. *D-150, Inc.*, 366 F. 2d 373, 375 (2d Cir. 1966); *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738 (2d Cir. 1953); *Rothstein* v. *Wyman*, 303 F. Supp. 339 (SDNY 1969), vacated on other grounds, 38 USLW 3477 (June 2, 1970).

Each day that plaintiffs' children are denied textbooks, is a day in which their educational development has been retarded and their mental development impaired. To compel plaintiffs' children to attend classes and sit text-bookless in classrooms with children who have text-books is to stigmatize plaintiffs' children in the eyes of their classmates and teachers, and to implant unjustly in them a sense of inferiority with other children and to seed his mind with hopeless frustration.

The despair and destruction caused to each child's self image and aspirations can never be set right. It can, however, be halted immediately.

The harm to defendants caused by the issuance of a Temporary Restraining Order is slight indeed in light of the apparent fact that the needed books are already on hand in the schools' stockrooms: neither the Superintendent of Schools of defendant school district nor any teacher therein denies that the required text-books are available for pupils, grades one to six. The result of the order sought—enjoining defendants refusal to loan text-books to the children of the named plaintiffs—involves no outlay of funds but merely a slight burden in distributing books. Even if text-books had to be purchased, the slight expense resulting from purchasing and loaning them to plaintiffs' children is far outweighed by the harm inflicted upon these children without such books. Moreover, if the plaintiffs do not ultimately prevail in their motion for a preliminary injunction, defendants would be able to recall the text-books issued as a result of this Court's order.

No prior application has been made for the relief requested herein.

WHEREFORE, plaintiffs respectfully request that this Court issue forthwith a Temporary Restraining Order pursuant to Rule 65 of the Civil Practice Law and Rules, and 28 U.S.C. § 2284(3), pending the determination of plaintiffs' motions for the convening of a three judge court and a preliminary injunction, *restraining the defendants*, their agents and employees *from denying free text-books to the children of the named plaintiffs herein*, and for such other and further relief as to the Court may seem just and proper.

/s/ CARL JAY NATHANSON
CARL JAY NATHANSON

(Sworn to by CARL JAY NATHANSON, September 24, 1970)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DR. GERALD G. GLASS

GERALD G. GLASS, being duly sworn, deposes and says:

I am a professor of Education and Director of the Reading and Study Center and Graduate Program in Reading at Adelphi University, Garden City, New York. I have taught in both elementary and secondary schools and have served as Reading Teacher and Reading Consultant. I have served as Reading Consultant to several school districts in the Long Island area. I received my doctorate from Syracuse University in 1957. I have done demonstration research in early reading activities within the Headstart Program. I am presently conducting research with selective schools in New York City, demonstrating a method of teaching decoding utilizing a perceptual conditioning rationale. I am credited with having developed the theorty of Perceptual Conditioning as the major determinant in learning to decode. I am a Visiting Professor at the University of Oregon. I am a past president of local councils of both the International Reading Association and the Council for Exceptional Children. I am a member of the Professional Advisory Board of the Association for Children with Learning Disabilities, and the Nassau County Board of Cooperative Educational Services. I am co-author of *From Flays into Reading* (Allyn & Bacon) with Muriel Klein, and a contributor to a volume in the "Learning Disorders" series, Vol. IV, *Reading Disability* (1970).

I have been included in the forthcoming volume, *Right to Read*, as one of twenty persons in the Nation making major contributions to the field of Reading.

At the request of Carl Jay Nathanson of Nassau County Law Services Committee, Inc., attorney for the plaintiffs, I have evaluated the effect of a deprivation of text-books upon pupils in grades one to six.

No educational program can exist without books. It is professionally unthinkable to assume that an educational program of even the meagerest scope would not minimally

include books. Books of all kinds, readers, workbooks, trade books, reference books, et al. The process of education, as conceived in this country, assumes that persons must "learn" not only from their own relatively narrow, actual experiences, but also from that extensive dimension that can only be offered through books.

Only books can speak to the child, at his request. Books can put the child into worlds beyond his own as one important step onto helping him establish the crucial "higher horizons". Without books lessons in school become just that—only lessons—and not an avenue toward utilizing the printed word in order to become well educated. A child without books is like a kitchen with only utensils and neither cooking facilities nor food. Both the process and product are gone.

It goes without saying that a good and successful education is crucial in the life of a child. Our country is racked in dissent and potential turmoil primarily because of the problem inherent in our schools today. The major academic problem is teaching youngsters to read—particularly those unfortunate children who come from very low social-economic backgrounds. It would be both cruel and professionally stupid to assume that the absence of books from the classroom would not significantly make the survival problem of learning to read unsolvable. It is most bizarre irony, in light of our expressed commitment to education, to observe poor children in West Hempstead being deprived of books.

A curriculum cannot survive without books. A classroom without books for all is a sham. It is both inadequate educationally and a waste of taxpayer's money. Best to close the schools and send the children back to the factories—at least there the productivity would be apparent.

I have been actively involved in the profession of education since 1950. My degrees include a Bachelors, Masters and a Ph. D. I have taught grade school and have been teaching at the university level for twelve years. All my experience and training have involved me in almost every phase of the educational scene. Try as I may I cannot recall any research findings or expressed opin-

ions of educators that would justify the assumption that text-books are necessary for secondary school students but not for grade school students. In fact, in my opinion a good case could be made for the grade school as having more pertinent requirements for text-books. Because the early school years are the formative school years, a wealth of material needs to be applied to offer the youngsters reinforcement for learning. It is not uncommon that a text-book in the primary grades serves as the major structure for the whole curriculum in any one subject. The youngsters are not as yet able to leave their text-books and work in various resource and reference facilities found in libraries. They are still "learning to read" and are not yet able in the area of "reading to learn". Thus, an elementary school youngster deprived of his text-books may in essence be deprived of the curriculum for that subject. In contrast, a high school student without a text-book could, with just a minimum amount of library work, discover the content of his own text-book in other sources. It is also a fact that if the elementary school does not utilize its text-books effectively the students would not have the basic skills to leave their text-books and work in the various library sources, as required in the secondary school. Thus, it would be impossible to have a successful high school program if the elementary school did not have good text-books from which to study.

/s/ GERALD G. GLASS
GERALD G. GLASS

(Sworn to by DR. GERALD G. GLASS on September 24, 1970.)

IN UNITED STATES DISTRICT COURT

ANSWER

The defendants, BOARD OF EDUCATION, Union Free School District No. 27, Town of Hempstead, Nassau County, New York, and EDWARD MOYER, as Superintendent of Schools, for their answer to the complaint herein, allege:

Answering Section I

1. Deny the allegations stated in Section I and beg leave to refer to the entire complaint.

Answering Section II

2. Deny the allegations stated in Section II and refer to the complete provisions of Education Law, Sections 701 and 703.

3. Admit the notification to parents as set forth in letter dated August 31, 1970, and the schedule of fees as annexed to the complaint; and further admit that the proposed school district budget was not approved.

Answering Sections III and IV

4. Deny the allegations stated in Section III and Section IV.

Answering Section V

5. Deny the allegations stated in paragraphs 1, 2, 3, 4 and 10, and beg leave to refer to the complete provisions of the section of the New York State Constitution and the paragraphs of the Education Law cited.

6. Admit the allegations stated in Paragraphs 5, 6, 7, 8 and 9.

Answering Section VII

7. Deny the allegations stated in paragraphs 1, 2, except admit plaintiffs' children attend the West Hempstead Public Schools in the grades indicated and were requested to pay the fees set forth in the schedule annexed to the complaint.

Answering Section VIII

8. Deny the allegations stated in paragraphs 1, 2, 3, and 4 as incomplete and beg leave to refer to the complete provisions of the paragraphs of the Education Law cited.

Answering Section IX

9. Deny the allegations stated in Section IX.

Answering Section X

10. Deny the allegations stated in Section X, except admit that under the provisions of the New York State Education Law, textbooks may not be provided free of charge to pupils in grades 1-6, when the voters have failed to approve a school district budget.

Answering Sections XI and XII

11. Deny the allegations stated in Sections XI and XII and beg leave to refer to the complete provisions of the Education Law heretofore alleged in the complaint.

12. Admit that the denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks.

First Defense

13. The complaint fails to state a claim against the defendants upon which relief can be granted.

Second Defense

14. In accordance with New York State Education Law, no board of education may incur a district liability in excess of the amount appropriated by a vote of the qualified voters unless such board is specifically authorized by law to incur such liability. In the absence of voter approval, the defendant Board of Education has no power to furnish free, textbooks to pupils in grades one through six.

Third Defense

15. The defendant Board of Education is presently operating under an "austerity" budget. Textbooks to pupils in grades one through six, together with many important school programs are not now considered ordinary contingent expenses and should be corrected by action of the New York State Legislature.

WHEREFORE, defendants demand that the complaint be dismissed.

/s/ HENRY A. WEINSTEIN
HENRY A. WEINSTEIN
Attorney for Defendants
Board of Education, Union Free
School District No. 27, and

EDWARD MOYER
158 Third Street
Mineola, New York 11501
516 747 2734

IN UNITED STATES DISTRICT COURT

Affidavit of Donald Siskind

DONALD J. SISKIND, being duly sworn, deposes and says:

1. I am President of the defendant Board of Education, Union Free School District No. 27, Town of Hempstead, Nassau County, New York, a corporate body which operates and conducts a public school system commonly known as the West Hempstead Public Schools.

2. I make this Affidavit in opposition (as hereinafter set forth) to the Motion which seeks a preliminary and permanent injunction restraining the defendant Board of Education from enforcing and implementing the provisions of New York State Education Law, Section 701 insofar as said provisions deny free textbooks to pupils in grades one to six; for a declaratory judgment holding said section unconstitutional insofar as it requires the distribution of free textbooks to pupils in grades seven to twelve, but not to pupils in grades one to six; for an Order convening a statutory three Judge District Court to hear and determine this application and for an Order determining that this action may properly proceed as a class action.

3. Heretofore, in June, 1970, and thereafter in July, 1970, at both the annual and a special district meeting called for such purpose, the defendant Board of Education, in accordance with Section 1716 of the Education Law, presented for voter approval a detailed statement in writing of the amount of money which would be required for the ensuing year for school purposes exclusive of public moneys. On each of the aforesaid occasions, the voters rejected the budget submitted. A third such vote is scheduled for Tuesday, September 29, 1970. Approval of the budget at this time may well render this action academic.

4. Under Section 1718 of the Education Law, no board of education shall incur a district liability in excess of the amount appropriated by a district meeting unless such board is specifically authorized by law to incur such lia-

bility. In the absence of voter approval, the Board of Education proceeded in accordance with Section 2023 of the Education Law, which authorizes a board to levy a tax in the absence of voter approval for the sum estimated necessary for teachers' salaries and for ordinary contingent expenses.

5. When a board of education is faced with adopting a contingent budget after the voters have refused or continued to refuse to approve the budget, the crucial question is the determination of what constitutes ordinary contingent expenses. In general, except for those items over which the statutes themselves either provide mandates for, or give discretion to the board of education, these may be considered those expenditures deemed to be absolutely necessary to operate and maintain schools. Section 701 of the Education Law, in reference to text books for grades 7-12, states that a board of education ". . . shall have the power and duty to purchase and loan . . . textbooks." No such provision exists for grades K-6.

6. Opinion 213 of Counsel to the Education Department, dated July 6, 1967, describes some expenditures which are not considered to be acceptable ordinary contingent expense items. In general these are defined as those items which are not required to maintain a minimum educational program nor to assure the health and safety of students and staff. Excluded are those expenditures which, by law, only the voters can authorize. Examples of the latter are textbooks for grades K-6 and certain transportation. Also not deemed to be ordinary contingent expenses are, among other things, restricted use of school buildings and grounds to outside organizations, capital expenditures, except in an emergency, interscholastic programs and restricted cafeteria and school lunch operations, as well as the purchase of new library books and instructional supplies. Included are teachers' salaraies and among other things, janitors' services, lights, office supplies, water and telephone service, as well as minimum school transportation.

7. Section 2024 of the Education Law provides that if any question shall arise as to what are ordinary contin-

gent expenses, the same may be referred to the Commissioner of Education. His decision shall be conclusive.

8. The defendant Board of Education, as a corporate body engaged in performing a duty imposed upon the Legislature by the State Constitution, is not only obligated but required to obey, follow and adhere to the provisions of the Education Law, and the decisions, orders and regulations of the Commissioner of Education. Failure to do so may result in removal from office and our share of state aid apportionment may be withheld under Section 306 and 1706 of the Education Law.

9. The obligation to obey the law, however, has not prevented the defendant Board of Education from seeking amendments or changes therein. Particularly with respect to textbooks, we have ourselves proposed a resolution for adoption at the New York State School Board Convention to be held next month. In this resolution we urge, among other things, that the State School Board Association actively support legislation which among other things would authorize the levy of a tax by a school district without voter approval in order to provide textbooks for students in grades K-6. We urged that despite the rejection of a proposed budget, the youth of our state should have access to an uninterrupted education and that the denial of textbooks to students in grades K-6 constitutes a serious disruption of such education. A substantially similar resolution has been introduced by another member board of education and has been recommended for approval by the Board of Directors of the State School Board Association. That resolution likewise seeks to extend the provision for free textbooks under contingency budgets to include children in grades K-6, as well as in grades 7 to 12, on the basis that it denies equal educational opportunity to the children of those families that cannot afford to buy textbooks. We are advised that the resolution has already gained legislative support.

10. While the thrust of the moving papers is to declare Section 701 of the Education Law unconstitutional, we would point out that Education Law Section 703, with respect to which no relief is sought, must be taken into consideration, and will be affected by any disposition of

this matter. That section expressly grants to the qualified voters of any school district the power to vote a tax for the purchase of all textbooks for pupils enrolled in grades 1-6.

11. The defendant Board of Education, as an autonomous, independent governmental unit may not and cannot pass upon the constitutionality of Section 701. We believe, however, that textbooks for all pupils are essential to a quality educational program and a necessary and fundamentally basic tool in the education of youngsters. We oppose this motion principally because we believe the remedy lies with the New York State Legislature and not with this Court.

/s/ DONALD J. SISKIND
DONALD J. SISKIND, President
Board of Education, West
Hempstead Public Schools

(Sworn to by DONALD J. SISKIND, September 23, 1970)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF EDWARD MOYER

EDWARD MOYER, being duly sworn, deposes and says:

1. I am Superintendent of Schools, West Hempstead Public Schools and one of the named defendants in the above action.

2. As Superintendent of Schools, I am the Chief Executive Officer of the School District with general supervision and direction over all school district activities. It is my duty to enforce all provisions of law and the rules and regulations applicable to the district.

3. The voters of this District have twice rejected a proposed budget and the school district is operating under "austerity" under the provisions of the New York State Education Law. In accordance with the foregoing, textbooks may not be provided free of charge to elementary school students. The denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks. Unfortunately, textbooks for elementary school students and many other essential items and programs are not considered an ordinary contingent expense and therefore are not permissible under an austerity budget. It is hoped that these items will be provided should the voters express their approval on September 29, 1970, when a third budget vote is scheduled.

4. I have read the affidavit of Mr. Donald J. Siskind, the President of our Board of Education submitted simultaneously herewith, and concur and join in the facts and views stated therein.

/s/ EDWARD MOYER
EDWARD MOYER

(Sworn to by EDWARD MOYER on September 23, 1970)

IN UNITED STATES DISTRICT COURT

DECISION AND ORDER, Denying Plaintiffs a Three-Judge Court and dismissing Plaintiffs' Complaint (Travia, J.)

The three plaintiffs are recipients of public assistance and are the parents of six elementary school children who are currently attending schools operated by the Board of Education of Union Free School District No. 27, Town of Hempstead, hereinafter called the "Board". The defendants are the Board, its Superintendent of Schools, Edward Moyer, the New York State Education Department and the Commissioner of Education, Ewald B. Nyquist.

Plaintiffs allege this to be a class action and, therefore, sue individually and on behalf of their minor children and on behalf of all others similarly situated. They challenge the constitutionality of Section 701 of the New York Education Law and claim that said section is violative of the Fourteenth Amendment of the Constitution of the United States in that it has the effect of denying plaintiffs equal protection of the laws.

Section 701 provides, in part:

> "3. In the several cities and *school districts of the state*, boards of education, trustees or such body or officers as perform the function of such boards *shall have the power and duty to purchase and to loan* upon individual request, *to all children* residing in such district *who are enrolled in grades seven to twelve of a public or private school* which complies with the compulsory education law, *text-books*. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities.

4. *No school district shall,* during the school year nineteen hundred sixty-six - sixty-seven, the school year nineteen hundred sixty-seven - sixty-eight or the school year nineteen hundred sixty-eight - sixty-nine *be required to purchase* or otherwise acquire *text-books,* pursuant to this section, the *cost of which shall exceed an amount equal to fifteen dollars multiplied by the number of children residing in such district who on the first day of October of such school year are enrolled in grades seven through twelve of a public or private school* which complies with the *compulsory education law, or in any subsequent school year be required to purchase or otherwise acquire textbooks, the cost of which shall exceed an amount equal to ten dollars* multiplied by the number of children residing in such district and so enrolled on the first day of October of such subsequent school year; and no school district shall be required to loan textbooks in excess of the textbooks owned or acquired by such district; provided, however that all textbooks owned or acquired by such district shall be loaned to children residing in the district and so enrolled in grades seven through twelve in public and private schools on an equitable basis.

5. In the several cities and school districts of the state, *boards of education,* trustees or other school authorities *may purchase supplies and either rent, sell or loan the same to the pupils attending the public schools* in such cities and school districts upon such terms and under such rules and regulations as may be prescribed by such boards of education, trustees or other school authorities.

6. The *commissioner of education,* in addition to the annual apportionment of public monies pursuant to article seventy-three of this chapter, *shall apportion to each school district an amount equal to the cost of the text-books* purchased and loaned by the district pursuant to this section, *but in no case shall the aid apportioned to the district be in excess of the following amounts*:

a. on account of expenditures made during the school year nineteen hundred sixty-six - sixty-seven, the school year nineteen hundred sixty-seven - sixty-eight or the school year nineteen hundred sixty-eight - sixty-nine an average of *fifteen dollars per pupil* residing in the district and enrolled in grades seven through twelve, and

b. On account of expenditures made in any subsequent school year an average of ten dollars per pupil residing in the district and enrolled in grades seven through twelve." (Emphasis supplied)

Plaintiffs seek the convening of a three judge District Court pursuant to 28 U.S.C. §§ 2281 and 2284, a preliminary and permanent injunction enjoining the defendants from enforcing Section 701 [1] and a declaratory judgment declaring said section unconstitutional.

It is alleged that on or about August 31, 1970 plaintiffs were advised by letter from the Board that all children in grades one to six would be required to pay a $7.50 rental charge on the first day of school for the loan of textbooks; that last year the plaintiffs' children, along with all the other children in those grades, received their text-books without charge; and that on the first day of school this year, textbooks were distributed to all children who paid the rental charge. Plaintiffs also allege that they are recipients of public assistance from the Nassau County Department of Social Services under the Aid to Families with Dependent Children program, and are unable to pay the rental charge,[2] and as a result their children have not received any textbooks.

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[1] If the operation of § 701 is enjoined, school districts will no longer receive the average of ten dollars ($10) per pupil in grades seven to twelve. Nor will the pupils in those grades be entitled to benefit from the voter approved tax authorized by § 703 (discussed *infra*) since § 703 is limited to pupils in grades one to six.

[2] Recently, New York has adopted a system fixing maximum allowances per family and has eliminated payments for special needs designated as "special needs grants." *N.Y. Social Services Law.* § 131-a.

The imposition of a rental charge for textbooks in grades one to six for the current school year resulted from the action of the local voters in rejecting budgets submitted by the Board in accordance with Section 1716 of the Education Law. On three occasions, the local voters refused to approve a budget.[3] In rejecting the budgets the voters also rejected a tax for the purchase and loan of textbooks free to the children in grades one to six. Authorization for such tax is provided in Section 703 of New York's Education Law.

Section 703 provides:

> "1. *The qualified voters* of any school district present at any annual school meeting or at any special school meeting duly and legally called for that purpose, *shall have the power*, by a majority vote, to be ascertained by taking and recording the ayes and noes, *to vote a tax for the purchase of all text-books used*, or to be used, *by pupils enrolled in grades one to six*, inclusive, in the schools of the district.
>
> 2. *If such tax shall be voted, it shall be the duty of the board* of education or trustees of such district, within ninety days thereafter, *to purchase and furnish free, text-books to all* the *pupils in grades one through six* inclusive attending the schools in such district. Such board of education or trustees shall have power to establish such rules and regulations concerning the use by the pupils of such text-books, and the care, preservation and custody thereof as it shall deem necessary." (Emphasis added).

As a result, the Board proceeded in accordance with Section 2023 of the New York Education Law which authorizes the Board to levy a tax in the absence of voter approval for the amount estimated to be necessary for teachers' salaries and for ordinary contingent expenses. The Board claimed that it could not consider textbooks for grades one to six to be acceptable ordinary contingent expenses. It based such decision on Opinion

[3] Only two of these votes were held prior to the opening of school when the decision to impose a rental charge was made.

213 of Counsel to the Education Department, dated July 6, 1967. Hence, no tax was levied to cover the cost of the textbooks for grades one to six.

The plaintiffs' claim, in essence, is that Section 701 violates the equal protection clause of the Fourteenth Amendment since it "has arbitrarily and unreasonably created two classes of pupils, those in grades seven to twelve, who will receive free textbooks, and those in grades one through six, who must pay for textbooks" in the absence of § 703 voter approval of a tax to pay for such textbooks.

It must be borne in mind that Section 701 grants free textbooks to children in grades seven to twelve only to the extent of Ten Dollars ($10) per pupil after the school year 1969-1970. Section 701(6b).

Jurisdiction

At the outset we are faced with the question of this Court's jurisdiction. Although the defendants have not raised the question of jurisdiction, this Court may raise that question on its own motion. *Thompson* v. *New York Cent. R.Co.*, 361 F. 2d 137 (2d Cir. 1966). In fact, it is this Court's duty to determine, sua sponte, whether it has jurisdiction. *Forgione* v. *United States*, 202 F. 2d 249 (3rd Cir. 1953), *cert. denied*, 345 U.S. 966 (1953); *Fullana Corp.* v. *Puerto Rico Planning Bd.* 257 F. 2d 355 (1st Cir. 1958). The signing of a show cause order does not prevent a subsequent determination that there is no jurisdiction. *Laughlin* v. *Cummings*, 105 F. 2d 71 (D.C. Cir. 1939).

In their complaint the plaintiffs base the jurisdiction of this Court on (a) U.S.C. §§ 1331, 1337 and 1343; (b) 28 U.S.C. §§ 2201 and 2202 and (c) 42 U.S.C. §§ 1983 and 1988 and (d) the United States Constitution and the Fourteenth Amendment thereof.

The Fourteenth Amendment and Section 1331

Since the plaintiffs complain of a denial of equal protection, their action is one that "arises under the Constitution . . . of the United States." 28 U.S.C. § 1331

(a). Section 1331(a) also requires that "the matter in controversy exceeds the sum or value of $10,000 . . ." Plaintiffs allege that the amount in controversy exceeds the jurisdictional amount. Obviously, the $7.50 rental charge each plaintiff is required to pay for each child in grades one to six does not approach the jurisdictional minimum.

The fact that the action is brought on behalf of a class does not help plaintiffs on this point either. If this action can be brought as a class action, which question need not now be decided, it is settled that the claims of the members of the class may not be aggregated to meet the jurisdictional amount. *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Rosado* v. *Wyman*, 414 F. 2d 170 (2d Cir. 1969), *rev'd on other grounds*, 90 S.Ct. 1207 (1970). Hence, the plaintiffs cannot cumulate the rental charges of all children in grades one to six who may be members of the class in an effort to reach the jurisdictional minimum.

It can reasonably be asserted that the plaintiffs' children are suffering far greater damages, viz., a substantial loss in their educational opportunity which undoubtedly will have more serious consequences than the amount of the rental charges herein involved. See *Brown* v. *Bd. of Education*, 347 U.S. 483 at p. 493 (1954). However, damages of this type are considered too speculative to create jurisdiction under § 1331. See *Rosado* v. *Wyman*, *supra*, and the cases cited therein.

Consequently, jurisdiction does not lie under § 1331.

Section 1337

Plaintiffs' reliance on 28 U.S.C. § 1337 is also erroneous. Section 1337 provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

This action does not arise under any Act of Congress and, therefore, there is no jurisdiction under § 1337.

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This action does not arise under any Act of Congress and, therefore, there is no jurisdiction under § 1337.

Sections 2201 and 2202

By reason of the fact that the plaintiffs are seeking to have § 701 of the New York Education Law declared unconstitutional, they have cited 28 U.S.C. §§ 2201 and 2202 to provide a jurisdictional basis. Section 2201 provides:

> "In a case of actual controversy *within its jurisdiction* . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." (Emphasis added).

As the statutory wording clearly indicates, § 2201 does not confer jurisdiction, but merely makes a remedy or procedure available in the federal court where jurisdiction already exists. *Benson* v. *State Bd. of Parole and Probation*, 384 F. 2d 238 (9th Cir. 1967), cert. denied, 391 U.S. 954 (1968); *El Paso Building & Construction Trades Council* v. *El Paso Chapter Associated General Contractors of America*, 376 F. 2d 797 (5th Cir. 1967). The same jurisdictional requirements for a case or controversy under this section must be met as in other suits. *Brown & Root, Inc.* v. *Big Rock Corp.*, 383 F. 2d 662 (5th Cir. 1967).

Nor does § 2202[4] confer jurisdiction. Section 2202 merely provides for the granting of further relief based on a declaratory judgment.

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[4] "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." (§ 2202).

Section 1988

Section 1988[5] is not relevant to the question of jurisdiction. *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii 1956), *rev'd on other grounds*, 256 F. 2d 728 (9th Cir. 1958); *Schatte* v. *Int. Alliance of Theatrical Stage Employees and Moving Picture Operators of United States and Canada*, 70 F. Supp. 1008 (S.D. Calif. 1947), *aff'd.* 165 F. 2d 216 (9th Cir.), *cert. denied*, 334 U.S. 812 (1948).

Sections 1983 and 1343

Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

If an action falls within § 1983, jurisdiction lies under § 1343, which provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * *

[5] "The Jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

The question is whether § 1983 is sufficiently broad to cover this action. On its face, § 1983 is practically all encompassing. The plaintiffs need only show "the deprivation of any rights, privileges or immunities secured by the Constitution and laws. . . ." In protecting "rights . . . secured by the Constitution and laws," § 1983 is capable of being construed as providing unlimited protection not only for "civil rights" but for practically any Federal Constitutional or statutory right without regard to the "amount in controversy" requirement of § 1331. Nevertheless, § 1983 has not been so broadly construed as the wording of the statute would indicate.

Section 1983 comes from § 1979 of the Revised Statutes, which in turn came from § 1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13. Adopted shortly after the end of the Civil War, the statute was enacted to enforce the provisions of the Fourteenth Amendment. This history and purpose of § 1983 have been emphasized by the Supreme Court. *Monroe* v. *Pape*, 365 U.S. 167, 171 (1961); *Hague* v. *CIO*, 307 U.S. 496, 509-510 (1939). Its history shows that the staute "was originally enacted by the Congress in the turbulent days of Reconstruction." *Francis* v. *Lyman*, 216 F. 2d 583, 586 (1st Cir. 1943). The effect of that turbulence on the statute has been noted by the Supreme Court:

> "The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues." *United States* v. *Williams*, 341 U.S. 70, 74 (1951).

Despite its speedy adoption the statute fell into a lengthy period of disuse. Not until recent years has § 1983 become the popular weapon of plaintiffs seeking entry into the feder courts. That popularity has created serious problems as Judge Magruder observed in *Francis* v. *Lyman, supra,* at pp. 587-8:

> "When courts come to deal with a statute phrased in terms of such vague generality, they are faced with two possible alternatives:
>
> (1) They may give effect to the statute in its literal wording, and thus reach results so bizarre and startling that the legislative body would probably be shocked into the prompt passage of amendatory legislation. This seems to be the approach which the Third Circuit intended to take in its opinion in *Picking* v. *Pennsylvania R.R.Co.*, 1945, 151 F. 2d 240.
> (2) The courts may refuse to regard the statute as an isolated phenomenon, sticking out like a sore thumb if given a strict, literal application; and upon the contrary may conceive it to be their duty, in apply the statutory language, to fit the statute as harmoniously as may be into the familiar and generally accepted legal background, and to confine its application, within reason, to those situations which might possibly have had the approval of the Congress if it had specifically adverted to the particular cases, bearing in mind the basic purposes which gave rise to the legislation in the first place. We leave it to others to determine whether such judicial process may fairly be characterized as 'interpretation' of the intent of Congress, as disclosed in the statutory language, or whether it is something else. At any rate, it is a function which courts sometimes feel called upon to exercise and indeed which in many cases they are expected to exercise.
>
> From the trend of decisions applying this particular statute, we think it no longer appropriate for this court to proceed in accordance with the first of the above alternatives. . . . Where the act has been invoked in situations which no doubt were a major

> concern of the Reconstruction Congress—for instance, where members of a state board for the registration of voters have refused to permit the registration of a negro, acting under color of discriminatory state legislation—the Supreme Court has not been loath to impose tort liability upon such state officials under the Civil Rights Act. . . . But *beyond such situations, it seems to be the tendency of the decisions to restrict the applications of the Civil Rights Act so as to avoid the appalling inflammation of delicate state-federal relationships which undoubtedly would ensue.*" (Emphasis added).

This Court cannot envision many situations which have the capacity to inflame "delicate state-federal relationships" and state-local relationships more than the present action. Sections 701 and 703, as amended, were born out of a rooted controversy in 1965. Nevertheless, this Court feels it is the better rule to assume jurisdiction of this case under § 1983 and § 1343(3), especially since the "jurisdictional issue" was neither briefed nor argued by the parties, and to consider the claimed deficiencies on the ground that the complaint fails to state a claim upon which relief can be granted. F.R.C.P. 12(b)(6).

Failure to State a Claim

Plaintiffs set forth three causes of action. First, they allege that § 701 creates "an arbitrary, irrational and discriminatory classification which deprives [them] sic and members of their class equal protection of law and an adequate education." Second, plaintiffs claim that § 703, in connection with § 701, subjects their children's right to books "to the arbitrary condition of a local school district tax assessment vote, while no such condition is imposed on older children's right to needed books." Finally, plaintiffs claim that they are denied equal educational opportunity and equal protection of the laws since textbooks are provided to children who are able to pay while such books are denied to children who are unable to pay.

We start with the proposition that under its Constitution, New York State has the primary responsibility for the maintenance of its educational system. In maintaining that system, it may legitimately attempt to conserve its financial resources by imposing some limitations through classifications on its programs, including its educational programs, so long as those classifications do not violate the equal protection clause of the Fourteenth Amendment. Whether or not a classification, here the statutory requirement in § 701 to provide textbooks rent free, up to a certain average cost, to grades seven to twelve, violates the equal protection clause depends upon whether the classification has an invidiously discriminatory purpose and effect. A classification is invidiously discriminatory if it does not have a "reasonable basis" under the traditional equal protection test [see *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911)], or if it is not justified by a "compelling" government interest under the more recent fundamental test [see *Shapiro* v. *Thompson*, 394 U.S. 618 (1970)]. This Court will assume, without deciding, that the latter test is applicable. Nevertheless, this Court concludes that New York's statutory provisions are free of any invidiously discriminatory purpose and effect since it is supported by a compelling government interest.

Prior to the 1965 amendments, the New York Education Law did not make any provision for free textbooks. Instead, § 701 provided that the

> "school authorities may purchase text-books and supplies and *either rent or sell* the same to the pupils attending the public schools. . . ." Former § 701(2). (Emphasis added).[6]

It was left to the voters in the school districts to levy a tax for the purchase of textbooks to be furnished free

[6] The present § 701, providing *free* textbooks for children in grades seven to twelve, is not limited to public schools but includes private schools complying with the compulsory education law. The constitutionality of § 701 on this point was upheld in *Board of Education of Central School District No. 1* v. *Allen*, 392 U.S. 253 (1968).

to children attending the public schools in grades one to twelve. Former § 703.[7]

In deciding whether to extend financial aid for the purchase of textbooks for all children in all schools,[8] the New York Legislature had four choices:

1. To make no contribution to local school districts for the purchase of textbooks to be loaned free of charge to *any* children and allow the then existing laws to stand;
2. To contribute to local school districts for the purchase of textbooks to be loaned free of charge *to all* children in grades one through twelve and repeal the then existing laws with their conditions;
3. To contribute to local school districts for the purchase of textbooks to be loaned free of charge *to all* children in grades one through twelve and pass additional laws restricting the amount to be used for each pupil in grades one through twelve;
4. To contribute to local school districts for the purchase of textbooks to be loaned free of charge to *some* children and amend Section 703 to provide for the others.

Choice of the first alternative was certainly constitutionally permissible and the plaintiffs do not complain of the failure of the Legislature to make this choice; nor do plaintiffs complain of the fact that the Legislature made a choice.

The Legislature may justify its failure to choose the second alternative on the basis of its legitimate interest in conserving the State's fiscal resources, providing that choice does not result in any invidious discrimination. Since choice of the second alternative would concededly

[7] The present § 703, also limited to the public schools, applies only to grades one to six since there is no need for a voter-approved tax for grades seven to twelve in view of the present § 701.

As comparison with the former §§ 701 and 703 reveals, the present sections do not operate to deprive children in grades one to six of anything they possessed prior to the 1965 amendments.

[8] "All schools" is limited to public or private schools which comply with the compulsory education law.

require an expenditure of funds greater than those needed under the third or fourth alternatives and since this Court cannot compel the State to expend any funds, much less additional funds for textbooks, this Court cannot fault the Legislature's failure to choose the second alternative.

It is the Legislature's choice of the fourth rather than the third alternative which has precipitated this action.

Choice Made As a Result of Legislature's Desire That As Many Children As Possible Have Textbooks

In making the fourth choice, the Legislature amended § 703 in 1965 to allow the voters in school districts to vote a tax for the purchase of textbooks for the pupils in grades one to six only. As the State defendants have pointed out, the cost of textbooks in grades seven to twelve is considerably higher than the cost of textbooks in grades one to six. Consequently, the grant in § 701 resulted in giving aid where the need was greatest in the event that the voters of a school district failed to vote a tax for the purchase of textbooks under § 703. Had the Legislature adopted the third alternative and substantially reduced the amount of the per pupil grant (below the $15 and $10 figures), then § 703 would of necessity have to be left unamended—i.e., with the voters of a school district given authority to vote a tax for the purchase of textbooks for children in grades one to twelve for the cost above the state grant. If the voters, under such circumstances, failed to vote for such a tax, then the parents would be required to make up the difference between the amount of the grant and the rental charge for textbooks, a difference which would be considerably more substantial in grades seven to twelve than in grades one to six. The Legislature was entitled to allocate its grant to pupils in those grades where it would do the most good. As the complaint indicates, the rental charge to each pupil in grades one to six is $7.50 per year, which may not be an insignificant amount to the *plaintiffs*, but, when examined from the *Legislature's* point of view,

may have represented the more practical alternative. Under the third alternative if the grant were spread thinly among all pupils and the voters failed to approve the additional cost required by Section 703, the parents would be required to pay the difference. In such an event, the cost to the parents with children in grades seven to twelve would be far greater than the cost to these plaintiffs. Additionally, far more parents would be unable to afford textbooks than is true under the present law and far more children would be without textbooks. New York State has a legitimate, compelling interest in seeing to it that as many as possible of its children receive textbooks.

Plaintiffs claim that their children and the other children in grades one to six have at least as great an educational need as children in the higher grades. However, there is no constitutional requirement that school expenditures be made only on the basis of pupils' educational need. *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd.* 394 U.S. 322 (1969). When viewed in this light, it is difficult to say the New York Legislature acted without either a compelling interest or a reasonable basis in choosing the fourth alternative. As the Supreme Court recently pointed out:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification is not made with mathematical nicety or because 'in practice it results in some inequality.'" 90 S. Ct. 1153, 1161 (1970).

Choice Made As a Result of the Legislature's Decision on Educational Needs

In enacting § 701, the Legislature stated in its declaration of legislative policy:

> "'The security and welfare of the nation require the fullest developemnt of the mental resources and skills of its youth. This calls for made adequate

> educational opportunities and increased efforts to educate more of the talent of our nation and requiring the *correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects.* The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to *educational programs which are important to our national defense and the general welfare of the state.*'" (Emphasis added)

It was to aid in "the correction of those imbalances in our educational programs" that the Legislature adopted § 701. Apparently, the Legislature felt that such correction could be accomplished by giving aid to assist local school districts in the purchase of textbooks which were to be used by pupils in the "second half" of their schooling, viz., in grades seven to twelve. It is noteworthy that it is in those grades that the sciences, mathematics and foreign languages are most commonly taught. The Legislature's desire to foster the study of certain subjects is sufficient to sustain the classification.

Additionally, the plaintiffs have come to the wrong forum. Any changes in the allocation of moneys to local school districts should be made by the Legislature. As the Court said in *Snell* v. *Wyman*, 281 F. Supp. 853, 862 (S.D.N.Y. 1968) *aff'd.* 393 U.S. 323 (1969):

> "Plaintiffs' complaints might move us to vote for changes if we sat as state legislators. But they do not approach the showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment."

See also, *McInnis* v. *Shapiro*, *supra*, where the Court noted at p. 332:

"Without doubt, the educational potential of each child should be cultivated to the utmost, and the poorer school districts should have more funds with which to improve their schools. But *the allocation of public revenues is a basic policy decision more appropriately handled by a legislature than a court.*" (Emphasis added).

Accordingly, it is

ORDERED that plaintiffs' motion is in all respects denied, and, it is further

ORDERED that the complaint be dismissed.

/s/ ANTHONY J. TRAVIA
U. S. D. J.

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPINION AND DISSENTING OPINION OF
COURT OF APPEALS

Before:

MOORE, KAUFMAN and TIMERS,*

Circuit Judges.

Plaintiffs appeal from an order of the United States District Court for the Eastern District of New York, Travia, Judge, dated October 28, 1970, denying plaintiffs' motion to convene a three judge court and dismissing plaintiffs' complaint.

Affirmed.

MOORE, Circuit Judge:

Plaintiffs-appellants are mothers of minor children and bring this action not only individually and on behalf of their children but also on behalf of others similarly situated [a class action]. The children attend school in the Union Free School District No. 27, Town of Hempstead [the School District]. The action is against the New York State Department of Education, Ewald B. Nyquist, as Commissioner of the New York State Education Department and the Board of Education of District No. 27 [the School Board].

Prior to 1965, each school system in New York State had to provide its own financing for the purchase of textbooks. In 1965, New York Education Law §§ 701 and 703 [McKinney's Consol. Laws, 1971] were amended. Quite simply, § 701 provides for state financial assistance [$10 per pupil] for the purchase of textbooks in grades seven through twelve. Section 703 provides that qualified voters within a school district may vote a tax for text-

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* Chief Judge, District of Connecticut, sitting by designation when oral argument was heard.

books for grades one through six. Under § 701, a School Board must supply textbooks to all children in grades seven through twelve residing in its district, regardless of whether they attend public or private schools. Under § 703, textbooks must be supplied to children in grades one through six wherever the voters authorize a tax for this purpose.

Where the voters fail to approve a proposed real estate tax to finance school operations, the Board may nevertheless levy a real estate tax on the property owners living within the School District, but only for such amounts as are necessary for "ordinary contingent expenses" of such School District. New York State Education Law § 2023 [McKinney's Consol. Laws 1971].[1]

On three occasions, the voters of this School District rejected a budget for the 1970-1971 school year proposed by the defendant School Board, after which the Board assessed a tax in accordance with § 2023.

The Board concluded on the basis of Opinion Number 213 of the Counsel to the Education Department, dated July 6, 1967, that expenditures for textbooks are not considered to be "ordinary contingent expense" items within the meaning of § 2023 of the Education Law. This opinion was based in part on the fact that § 703 authorizes a vote on such expenses. Therefore, the Board decided that it was not legally entitled to tax to raise money for textbooks.[2]

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[1] Section 2023 provides:

> "If the qualified voters shall neglect or refuse to vote the sum necessary for teachers' salaries, after applying thereto the public school moneys, and other moneys received to be received for that purpose, or if they shall neglect or refuse to vote the sum estimated necessary for ordinary contingent expenses, the sole trustee, board of trustees or board of education may levy a tax for the same, in like manner as if the same had been voted by the qualified voters."

[2] Because no budget was approved, it was necessary for the School Board to charge for various other optional services and supplies. Thus, children living less than a given distance from the school [which varied according to age] were required to walk to school or pay a fee for transportation, and charges were made for certain other supplies including workbooks, duplicating paper,

The complaint sought the following relief:

[1] that a three judge District Court be convened to determine the controversy;

[2] that preliminary and permanent injunctions be entered enjoining defendants from enforcing § 701 of the New York Education Law on the ground that the classification of pupils in grades one to six and grades seven to twelve is "arbitrary, irrational and discriminatory"; and

[3] that a declaratory judgment be entered declaring § 701 et seq. unconstitutional as violating the Fourteenth Amendment.

More specifically, the First Cause of Action claims that § 701 "in(di)vidiously (sic) discriminates . . . by creating an arbitrary and discriminatory classification which deprives plaintiffs and members of their class of equal protection of the law and an adequate education." A Second Cause of Action alleges that §§ 701 and 703 impose a majority vote approval of a tax assessment to enable children in grades one to six to receive free textbooks and that this constitutes a denial of equal protection. A Third Cause of Action states that pursuant to §§ 701 and 703 textbooks can be obtained in grades one to six only upon the payment of a rental fee [$7.50 per pupil]; that plaintiffs are indigent and cannot pay a fee; [3] and that by rea-

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materials, etc. Children were also required to provide their own pens, pencils, notebooks and the like. Although these facts were mentioned in the complaint, this action only attacks the failure of the defendants to provide textbooks.

[3] Section 131-a of the New York State Social Services Law [McKinney's Consol. Laws, Supp. 1971] provides maximum amounts for benefits to be paid to plaintiffs, and abolishes the old system of special grants for specific items of need, replacing them with fixed grants to be determined based on the needs of families in the area where the recipient lives. Plaintiffs allege that under the old system, grants were made to pay for textbooks. In *Rosado* v. *Wyman*, 397 U.S. 397 (1970), the Supreme Court held this section, as originally enacted, to be in violation of 42 U.S.C. § 602(a)(23) which requires that a state in order to receive federal benefits must not lower the standard of need in use in that state on January 1, 1967. Thereafter, the New York State Legislature passed the new version of § 131-a now in effect, excluding from the maximums such items as housing, fuel for heating, furniture, child care services

son of their poverty their children are deprived of equal educational opportunity. They describe the potential situation quite realistically by alleging [Complaint, XII(b)]:

> "Indigent children sitting bookless, side by side in the same classroom with other more wealthy children learning with purchase [sic] text-books engenders a widespread feeling of inferiority and unfitness in poor children and is psychologically, emotionally and educationally disastrous to their well-being."

An order to show cause for a temporary restraining order was issued by Judge Travia. Affidavits and memoranda were submitted in support of and in opposition to the application. The Board of Education and the Superintendent of Schools answered demanding dismissal of the complaint.

In his decision, Judge Travia assumed jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 [4] and proceeded to consider "the claimed deficiencies on the ground that the complaint fails to state a claim upon which relief can be granted. F.R.C.P. 12(b)(6)." 319 F. Supp. at 278. In essence the court held that in enacting §§ 701 and 703, the Legislature acted on a reasonable basis free from irrationality or arbitrariness; that "the Legislature was entitled to allocate its grant to pupils in those grades where it would do the most good"; and "that New York State has a legitimate compelling interest in seeing to it that as many as possible of its children receive text-books." 319 F. Supp. at 280. The court, therefore, denied plaintiffs' motion and dismissed the complaint. From the denial of

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and the like. In the face of the new law, New York has continued to receive federal funds, and no allegation is made here that § 131-a is still inconsistent with 42 U.S.C. § 602(a)(23). Thus it would appear that the fixed allowance received by plaintiffs was intended to cover this as well as other contingent needs. This is especially so since the failure to provide books resulted in a similar expense for all children in the School District.

[4] Since we conclude that the District Judge properly dismissed the entire complaint, we need not discuss which defendants were appropriate parties under § 1983 and the Eleventh Amendment. See *McMillan* v. *Board of Education*, 430 F.2d 1145, 1148, 1149 (2nd Cir. 1970).

the motion for the convening of a three judge statutory court, and the dismissal of the complaint, plaintiffs appeal. In addition to the briefs of the parties, this court has the advantage of a well-prepared brief and reply brief submitted by the Center for Law and Education of Harvard University.

At the outset, there must be a determination as to whether Judge Travia properly denied plaintiffs' motion for the convening of a three judge court. If a three judge court is ultimately to decide upon the rationality of the New York State Legislature's enactment of §§ 701 and 703, there is little to be gained by having this court of three judges subject its own rationality to further scrutiny.

The guidelines stated by the Supreme Court in *Idlewild* v. *Bon Voyages Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962) were that the "district court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial and whether the case presented otherwise comes within the requirements of the three judge statute." But what is "substantial"? And who is to make this decision? Quite obviously, only the court of last resort—and even then the concept of rationality of legislative judgment may be decreed by the narrow margin of a five to four vote. Searching further in a field where precedent is supposedly helpful, we find that the district court may reject a constitutional claim "because its unsoundness so clearly results from the previous decisions of this Court [the Supreme Court] as to foreclose the subject." *California Water Service Co.* v. *City of Redding*, 304 U.S. 252, 255 (1938).

This admonition requires research into decisions of the Supreme Court which might "foreclose the subject." If the decisions justify such a conclusion, the Supreme Court with all its pressing business should not have to cope with indiscriminate three judge appeals. This case is an example. The district judge hears the case and this court hears it. Four judges. Should this court send the case to a three-judge court two more. Then to the Supreme Court. Fifteen judges in all will have reviewed the rationality of a legislative body. If we affirm, four judges

will have been involved and the Supreme Court at least will have the privilege of deciding whether they wish to become further involved.

Recently the three judge court problem was considered by this court in *Miller* v. *New York Stock Exchange*, 425 F. 2d 1074, cert. den. 398 U.S. 905 (1970), wherein the question was whether "we must nevertheless reverse because the result was not so clearly predestined that he could dispense with having two other judges, possibly two of us, help him reach it—and this even though the State, for whose benefit the three-judge provision was enacted, was quite content to have him act alone." We concluded that it was unnecessary to reverse under these circumstances even though it denied the plaintiffs a direct appeal to the Supreme Court. We referred to the guidelines set forth in *Green* v. *Board of Elections*, 380 F. 2d 445, 449 (2nd Cir.), cert. den., 398 U.S. 1048 (1967), Judge [now Chief Judge] Friendly saying:

> "But [not having a direct appeal to the Supreme Court] is hardly of great moment in view of the immediate availability of certiorari to the Court of Appeals and the likelihood of this being granted in the event the Supreme Court thinks a constitutional claim may have been erroneously rejected."

The limited area for the three judge court was further defined by Judge Kaufman in *Astro Cinema Corp., Inc.* v. *Mackell*, 422 F. 2d 283, 298 (2nd Cir. 1970):

> "This is particularly so when the aim of § 2281 was to protect the States against declarations of unconstitutionality emanating from a single district judge. While it is true that plaintiff loses his direct appeal to the Supreme Court not only is that body capable of remedying any injustice through the device of certiorari, but the direct appeal provision, in context, seems far more likely to have been for the benefit of the state than the plaintiff." [5]

[5] In that case, we refused to remand for a three judge court even though we felt that the constitutional objections raised were "not clearly insubstantial" and even though we directed defendant therein to return to plaintiffs an allegedly obscene film which the

The easiest solution for the district judge, whenever the words "United States Constitution" or "Fourteenth Amendment" appear in a complaint, would be to relieve himself of two-thirds of the responsibility for the decision by requesting the convening of a three judge court. This would seemingly be the approach of the Fifth Circuit as declared in *Jackson* v. *Choate*, 404 F. 2d 910, 913 (1968), in which the Court believed that "unless it is determined that it was an open and shut case three Judges must pass on the merits even though it means that three more must do so again." The Court felt that it would be better to "constitute a three judge court and allow that court to determine initially" whether it should have been constituted. This Court recently declined to adopt this policy. A district judge should not feel that he is merely a rubber stamp or that he exercises his judgment at his peril. In *Heaney* v. *Allen*, 425 F. 2d 869, 871, 872 (1970), this Court said:

> "If a 3-judge Court is once assembled, the temptation to stay together is strong. Indeed, as pointed out in *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 410 (S.D.N.Y. 1964), appeal dismissed for lack of jurisdiction, 382 U.S. 111 (1965), aff'd. 364 F. 2d 241 (2nd Cir. 1966), cert. denied, 385 U.S. 1036 (1967), it is usually rather idle for three judges to waste time deciding whether they have been properly assembled, since the three judge court has ju-

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defendant District Attorney had seized from plaintiffs, because it appeared that an injunction would not there have been an appropriate form of relief. So too here. The defendant School Board in its answer indicated that it favored supplying all children with textbooks, and that it had suggested to the voters that such action be taken. Under these circumstances, it is clear that declaratory relief would be sufficient in the event that the complaint had been meritorious. Furthermore, under *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820 (1970), it is now clear that where such relief is granted, there is no direct appeal to the Supreme Court, and, although we are not called on to decide the question herein, after *Catholic Medical Center*, it is dubious that a three judge court need be convened in any event where it is evident that injunctive relief will not be granted.

> risdiction in any event whereas a wrong decision to return the issue to a single judge can create all sorts of trouble. The Fifth Circuit practice thus means in effect not only that three judges will have been called together to decide a question that in fact was determinable by one but that an appeal will almost certainly be added to the Supreme Court's docket, an unfortunate burden on that overworked tribunal."

No disagreement is voiced with the Fifth Circuit's concern that "it takes judicial prescience of a Delphic order to say with certainty that the attack is insubstantial" [Jackson at p. 913], but the prophetess did not abstain from her prophecies because of doubt. She merely couched them [not unlike some court decisions] in terms that lent themselves to divers constructions. Therefore, although this case may not be "open and shut" [so few cases are], the decisions of the Supreme Court and other courts which are as analogous as possible to this case should be examined to ascertain whether they "foreclose the subject". If they do, we should avoid a procedure which will make for repetition. Of course, no two cases involving equal protection are alike as to facts and, were mere factual variation the test, all cases should be channeled to the Supreme Court on the chance that some distinguishing feature might be found. However, the Supreme Court reminds us that "[t]he Three-judge requirement is a technical one to be narrowly construed. *Phillips* v. *United States*, 312 U.S. 246, 251" *Bailey* v. *Patterson*, 369 U.S. 31 at 33 (1962). See also *Goldstein* v. *Cox*, 396 U.S. 471 (1969); *Rockefeller* v. *Catholic Medical Center*, supra; *Gunn* v. *University Committee*, 399 U.S. 383 (1970). We believe that a review of the Supreme Court's decisions in related situations justifies affirmance of Judge Travia's opinion and our own in not remanding to a three judge court.

Our function is not to enact laws for the State of New York or to tell the Legislature how better they could have legislated. We are restricted to making an examination of the law as actually enacted and to declaring whether there is a reasonable basis for this classification.

Any state-created classification which is attacked as a denial of equal protection must be examined against either of two constitutional standards: [A] that the classification is rationally related to a legitimate state end [see *McDonald* v. *Board of Elections*, 394 U.S. 802, 809 (1969); *McGowan* v. *Maryland*, 366 U.S. 420 (1961)]; or [B] that the classification is justified by a compelling state interest. See, e.g. *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

Judge Travia applied standard [B] and found a compelling state interest [319 F. Supp. at 278]. The legislative purpose behind § 701 indicates that the Legislature sought to promote education in the fields of science, mathematics and foreign languages—an end which could be accomplished through the furnishing of textbooks in the grades which covered those subjects [seven through twelve]. Judge Travia therefore reasoned that whichever standard is applied is of little consequence because the legislative scheme is reasonable; it is buttressed by compelling state justifications; and it is not tainted with the slightest hint of invidious discrimination.

Supreme Court decisions would indicate that standard [A] is also appropriate in cases such as this.

In *Dandridge* v. *Williams*, 397 U.S. 471, 484 (1970), the Supreme Court stated that "[I]f the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some equality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78." There, the State of Maryland had "to reconcile the demands of its needy citizens with the finite resources available to meet these demands." *Dandridge*, at p. 472. The Court recognized that in the area of economics and social welfare, even where such legislation involves "basic economic needs of impoverished human beings," "the Fourteenth Amendment gives the federal courts no power to impose upon the State their views of what constitutes wise economic or social policy." Dandridge, at pp. 485, 486.

This proposition has long been accepted by the Supreme Court. In *McGowan* v. *Maryland*, supra, 366 U.S. at 426, the Court said:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests upon grounds wholly irrelevant to the achievement of the State's objectives . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Similarly, in *McDonald* v. *Board of Elections*, 394 U.S. 802 (1969), the court [Warren, Chief Judge] said:

> "Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently and the presumption of statutory validity that adheres thereto admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally irrelevant to the pursuit of that goal. Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only 'if no grounds can be conceived to justify them [citations omitted].' With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.' *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. . . ."

Consistent with this theory, in *Briggs* v. *Kerrigan*, 431 F. 2d 967, 969 (1st Cir. 1970), aff'd. 307 F. Supp. 295 (D. Mass. 1969), the Court approved of a Boston practice of giving free lunch only to children in the secondary

grades, citing "the wisdom of the remainder in *Dandridge* that the Fourteenth Amendment does not require the government either to attack a program in its entirety or not at all." With limited resources, the reason for mandating textbooks only for children in the upper grades is made apparent by the following statement of purpose which accompanied the passage of § 701 by the New York Legislature:

> "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. . . . It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state" [Laws of 1965, Ch. 320, Sec. 1].

In the opinion of the Legislature, the goals sought to be achieved were best realized by supplying books during the years in which the specified subjects principally were taught. Sound argument can be made that children in the formation years in grades one to six should have books and of a value far in excess of $7.50 if a maximum of educational opportunity is to be achieved. However, the Legislature was not required to address itself to this argument where the action it did take was clearly justified in terms of the goals it sought thereby to advance. Thus, plaintiffs' first claim does not raise a substantial constitutional question, the answer to which is not to be found in Supreme Court precedential guidance.

The second claim made by plaintiffs, that they were subjected to an unfair burden in that they could not have books unless the voters approved is clearly foreclosed by *James* v. *Valtierra*, —— U.S. —— (April 26, 1971).

That case involved a California statute which provided that low-income housing could not be built without voter approval. As the dissenting opinion there pointed out "[p]ublicly assisted housing projects designed to accommodate the aged, veterans, state employees, persons of moderate income, or any other class of citizens other than the poor, need not be approved by prior referenda." However, the Supreme Court approved this arrangement because "referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." Section 701 does not make any such differentiation based on the income level of the proposed recipients but instead draws the lines according to grade level.[6] Thus, clearly this law is a valid means by which New York leaves some control over the school budgets to the voters of the affected school districts.

The claim that § 701 discriminates against indigents is also without merit. Insofar as this claim suggests that the State should rearrange its scheme for financing public school education so as to obviate the necessity for voter approval of funds for textbooks for primary school children, it is precluded by *Valtierra* for the reasons stated above.

At oral argument, plaintiffs did not press any broader attack on New York's failure to provide textbooks, conceding that if New York had not provided textbooks to

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[6] The enactment of § 701 provided public funds for textbooks of children in private and parochial schools for the first time in the modern history of New York State. The passage of § 701 resulted in large part from pressure from those whose children attended these schools and in the face of substantial constitutional challenge on church-state grounds, which challenge was rejected in *Board of Education* v. *Allen*, 392 U.S. 236 (1968). It is not unlikely that the legislature felt that funds supplied to children attending private schools should be subject in part to voter acceptance of local school budgets, just as are portions of the funds going to public school children. Thus, persons who would otherwise have no stake in the school budget because their children attended non-public schools were given such a stake, and the difficulties involved in habitual opposition to school budgets from those with no stake in such budgets were lessened. So delicate complex and fair a political balance should not be the subject of rearrangement by the federal courts.

students in the secondary grades, their contentions would fail. The amicus raises a broader question which is hinted at by the plaintiffs in their brief: that wherever the State undertakes to provide education,[7] there is a duty to provide free textbooks.[8]

Given that it is clear that the State was privileged to assign to the School District the task of financing textbooks used in the lower grades and that it was privileged to assign the voters of such School District the task of deciding whether or not to supply the funds for such textbooks, the only remaining question is whether the voters were privileged to deny such requests for funds while still endeavoring to provide an education for the students of the District. The argument that they were not so privileged is based on two related lines of case law. The first is that group of cases providing indigents, especially indigents accused of crime, access to the Courts and free

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[7] Since there is no affirmative federal constitutional duty for the States to provide education to its students duties imposed on the States are imposed on the basis of a finding that the state is discriminating invidiously in the way it conducts such education as it chooses to provide. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Griffin* v. *Prince Edward Co. School Board*, 377 U.S. 218 (1964).

[8] From a procedural point of view, it is clear why plaintiffs have not pressed this contention. The complaint asks only that § 701 be declared unconstitutional and its enforcement enjoined, but that section in no way prevents the School Board from providing textbooks and § 703 specifically authorizes the voters to assess a tax for such purpose. If it is a constitutional requirement that schools provide children with free textbooks where the children are being provided a free education, it is not the State statute that is offensive but rather the legislative action of the voters of the School District in failing to do that which is allegedly constitutionally required, for surely if the voters of all School Districts in the State subject to §§ 701 and 703 approved taxes for textbooks, no constitutional violation under this third theory could be claimed. Thus, this theory is actually an attack on a local act and is not properly the subject of a three judge court regardless of its merits. Furthermore, in order to properly raise this question, plaintiffs would also have to amend their complaint to attack the constitutionality of the voters' action.

legal counsel.[9] The reasoning of these cases is that the State is required to provide these services and access because to do otherwise would be to deprive indigents of due process. Obviously, though, due process is not involved here. The other more general line of cases relates to the Equal Protection Clause. These cases, which are strictly limited in their scope, all deal with conditioning the exercise of some fundamental right on the payment of money, or forfeiture of benefits otherwise available, without a showing of "compelling state interest."[10] These cases are inapplicable here for although education is no doubt an area of fundamental importance, the Supreme Court has made clear its view that in the area of social welfare, the "compelling state interest" theory does not apply even though basic needs may be involved.[11] Plaintiffs suggest that *McMillan* v. *Board of Education*, supra, held that question involving the right of poor people to educational services presents substantial constitutional issues. In that case, brain damaged children who could afford private school tuition of approximately $3000, who gained admission to such schools and actually attended them, received a grant from New York in the amount of $2000; other brain damaged children received special public education, at a cost well in excess of $2000. Plaintiffs could not gain entry to the public schools because of a waiting list

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[9] See e.g. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Burns* v. *Ohio*, 360 U.S. 252 (1959); *Smith* v. *Bennett*, 365 U.S. 708 (1961); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

[10] See e.g. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) [right to travel guaranteed by privileges and immunities clause may not be conditioned upon the forfeiture of welfare benefits]; *Tate* v. *Short*, 401 U.S. 395 (1971) [right against deprivation of liberty without due process may not be conditioned upon payment of a fine where no jail sentence imposed and person unable to pay fine]; *Harper* v. *Board of Elections*, 383 U.S. 663, 669-70 (1966) [right to vote guaranteed by fourteenth and fifteenth amendments may not be subjected to poll tax even where twenty-fourth amendment is inapplicable.]

[11] Certainly, no one would contend that a student's need for textbooks is any more fundamental than such items as food and clothing which are provided through welfare grants.

and could not afford the private school tuition differential. The Court felt that the fact that indigents received nothing from the program while others received large sums in cash or equivalent services was sufficient to justify a remand to a three judge court, although the Court thereby remanding was "not suggesting that [the issues] will necessarily be resolved in plaintiff's favor."

However, that Court expressly recognized that the State was under no constitutional duty to provide any grants whatever to such students, and that it could remove constitutional doubts merely by providing $2000 grants to all children similarly affected. Here all similarly situated students are being treated alike; no public money whatever is being spent in the School District for the provision of textbooks to children in the primary grades. It is undisputed that such money as the School Board has to spend is being spent in such a way as to benefit all students [i.e. on teachers' salaries, building maintenance and the like].[12] In *McMillan* had $2000 grants been made to all students not attending public schools, which the *McMillan* Court felt would remove constitutional doubt from the statute, those who spent the additional money and attended private schools would receive a better education. Similarly, in this case those who can afford textbooks will also no doubt receive a better education than those who cannot but that is because they had the financial means to supplement that which the State provides and not because the State has provided them with more than has been provided plaintiffs.[13]

Unless the courts are to take over legislative functions and to decree that all children in all grades are to have free textbooks, the judgment of the Legislature should control. That judgment was not exercised in an arbitrary

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[12] Plaintiffs were of course given the benefit of such instruction notwithstanding that they did not rent textbooks. Compare *Byrd* v. *Sexton*, 277 F.2d 418 (8th Cir. 1960) [Blackmun, Judge] [student excluded from public school for failure to pay enrollment fee denied federal relief].

[13] Plaintiffs ignore the impact of the welfare benefits they receive, which under the applicable federal statute and *United States* v. *Wyman*, supra, should be adequate to cover this type of expense.

and unreasonable manner. Although the Legislature differentiated between two groups of grades in its allotment, the discrimination cannot be characterized as "invidious". Upon the record and the decisions relating to the appointment of three judge courts and upon the merits, Judge Travia acted properly in denying the convening of a three judge court and in dismissing the complaint.

Affirmed.

KAUFMAN, Circuit Judge (dissenting):

I dissent and would hold that plaintiffs have established at the very least a substantial claim that as applied in the Union Free School District No. 20, Town of West Hempstead, where their children are enrolled in the public schools, New York Education Law § 703 deprives indigent children of the equal protection of the laws.[1]

Despite the tone and intimations in the lead opinion's discussion of the appropriate standard for convening a three-judge court, I understand Judge Moore ultimately to agree that we are indeed bound on this appeal to inquire no further should we find a "substantial" claim made out, *Idlewild* v. *Bon Voyages Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962), viz. one not virtually

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[1] In *Boddie*, the argument found decisive by the district court and by the majority here—that the state has primary responsibility for deciding how to spend limited resources—was explicitly considered and rejected. I agree that *McInnis* v. *Shapiro*, 293 F. Supp. 327, 336 (N.D. Ill. 1968) (decided by a three-judge court), aff'd 394 U.S. 322 (1969) (per curiam) and *Dandridge* v. *Williams*, 397 U.S. 471 (1970), among the cases cited by the majority render insubstantial plaintiffs' subsidiary theories that New York discriminates between elementary school students and those in higher grades by providing only the latter with free books, or by conditioning free books for the former only on a vote of the electorate. Unfortunately, discussion of these insubstantial arguments consumed the entire opinion of the district court below and also claims the preponderance of the discussion of the majority here. But the essence of plaintiffs' case is discrimination between poor children in elementary schools without books and their more affluent classmates who can afford texts. The limited resources argument is no more availing to answer that claim than it was in *Boddie*—or *Griffin*, *Douglas*, and *Harper*, *infra*.

"foreclosed" by controlling precendent, *California Water Service Co.* v. *City of Redding*, 304 U.S. 252, 255 (1938). Nor do I interpret my own opinion in *Astro Cinema Corp, Inc.* v. *Mackell*, 422 F. 2d 293, 298 (2d Cir. 1970), declining to convene a three-judge court to evaluate plaintiffs' "futile" request that an impending criminal prosecution be enjoined, which the panel found "completely unwarranted," as in any sense suggesting that we are empowered to decide more at this juncture than whether plaintiffs' claim is "substantial."

Nevertheless, it is appropriate to analyze further the interesting question raised by the majority as to the relation between the three-judge court statute applicable here, 28 U.S.C. § 2283, [sic] and considerations of judicial economy. While I do not question the majority's arithmetic, I do suggest that the implication that over the long term, applying a stricter standard on review of a decision refusing to convene a three-judge court will consume fewer judges' energies amounts at best to a self-fulfilling prophecy. The lead opinion overlooks that convening a three-judge court in the first instance, because it bypasses the normal appellate level, can be expected for that reason to involve fewer judges in the ultimate disposition of a case than does a refusal to convene such a court. Not only will two fewer appellate judges then pass on the merits than otherwise (there will be only one additional district judge)—assuming an appeal would have been taken from a district court judgment refusing to convene a three-judge court—but the possibility of full in banc consideration at the appellate level is avoided. Nor is this the end of the matter, for the majority's own analysis of the large number of judges necessarily drawn in when an application for a three-judge court is improperly denied, far from supporting a stricter standard than that established by precedent, leads to the conclusion that the "substantial claim" test may lead to the most efficient operation of the three-judge court scheme as presently constituted. I agree with Judge Moore, as I said in *Astro-Cinema*, that the primary purpose of this three-judge court statute is to prevent a single judge from interfering with a state's

governmental operations. But the implication of this is not, as one might at first impression suppose, that it is futile to convene a three-judge court other than to ratify a single district judge's own conclusion that a state statute is indeed unconstitutional. If district court did apply that harsher standard, there would inevitably be a higher percentage of reversals on appeal, and thus a greater waste of judicial resources.

This is not to say that the three-judge district court procedure remains the desirable and efficient procedure envisioned when Congress provided for it. At least for administrative reasons and perhaps because of more basic flaws in its structure as well, it is often in practice costly, cumbersome and time-consuming, particularly in the face of the great increase in the volume of cases in appellate courts and the corresponding influx of demands for three-judge courts. But until Congress overhauls the system, I believe judges should not in their frustration yield to the temptation to legislate their own solutions [a principle rigorously adhered to by the author of the lead opinion in the past, see *Caplin* v. *The Marine Midland Grace Trust Co.*, 439 F. 2d 118 (1971)], especially, as here, when the judicial statutory amendment is as likely to increase burdens and delays as to alleviate pressures. The test is and should remain—is there a substantial claim?

On the merits, it is difficult to square the majority's conclusion that the claim presented in this case is not substantial with its admission that "education [is] an area of fundamental importance" and its recognition of binding precedent requiring the state to demonstrate a "compelling state interest" to justify conditioning the exercise of fundamental rights or the enjoyment of fundamental "privileges" upon the payment of money. The majority also concludes that the plaintiffs "realistically" describe the situation of their sons and daughters when they portray "[i]ndigent children sitting bookless, side by side in the same classroom with other more wealthy children learning with purchase[d] textbooks," a situation that inevitably "engenders a widespread feeling of inferiority and unfitness in poor children and is psycho-

logically emotionally and educationally disastrous to their well being." No authority supports the melancholy conclusion that plaintiffs children, severely handicapped relative to their more affluent classmates solely by the operation of the statute complained of, are deprived of equal protection.

The ideal of education in our society is to free men and women to pursue their own lives more fully. Economic and social mobility, cultural richness and diversity, the inheritance of arts, skills, thoughts and values, the strong and flexible operation of democratic political processes, the growth and function of private institutions and associations, the habits, structures, virtues and idiosyncrasies that make our society unique and coherent take root in formal and informal education. In New York State, as elsewhere in the United States and in most other developed countries, the government has arrogated to itself responsibility for administering and enforcing a formal and public system of education. It has done so both by the requirement of law that all children receive schooling until they reach a specified age and by providing schools, free to their users, supported by tax revenues. Courts have been alert to the potential for unwarranted incursions by the states into constitutionally protected spheres of individual liberty—which are nothing less than rights to self-education and self-direction—inherent in compulsory and public education. They have also rightly viewed with skepticism and suspicion state action that has resulted in systematic inequality between the quality of public education offered different classes of children.

The capstone of cases recognizing and protecting children's rights against over-zealous state attempts to regulate their lives beyond constitutional bounds is the recent decision of the Supreme Court in *Tinker* v. *Des-Moines School Dist.*, 393 U.S. 503, 514 (1970) counting freedom from unjustified prior restraints of speech and expression among the "fundamental rights which the state must respect" in administering their public schools. Id. at 511. The majority opinion in this case is inconsistent with the philosophy of *Tinker* and its predeces-

sors, see *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), as expressed in *West Virginia* v. *Barnette*, 319 U.S. 624 at 637, quoted in *Tinker*, 393 U.S. at 507:

"The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Board of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." Unless inequality based on wealth is a principle of our government, I am unable to reconcile these words with today's opinion.

Nor are the words of the fountainhead of parallel and complementary precedent guaranteeing equal educational opportunity without the vestige of invidious discrimination, *Brown* v. *Board of Education*, 347 U.S. 483, 493, any less incompatible with the majority's resolution of this case:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide

it, is a right which must be made available to all on equal terms.

Despite this, the defendants have admitted in their formal answer in this litigation that plaintiffs' children are not offered an education on terms equal to those of other children attending the same schools whose parents happen to be wealthier than are theirs. In evaluating the adequacy of the present complaint to support impaneling a three-judge court, we must accept as true its averment that because the voters in plaintiffs' school district refused to provide, as they were empowered to do, free school books to children in grades one through six of their public schools, or at least to those whose parents cannot afford to rent them, plaintiffs' children must attend school without the aid of textbooks provided to other children in the same schools and same grades whose parents can afford the rental fee charged by the state for their use. See *Boddie* v. *Connecticut*, 401 U.S. 371, 373 (1971). Defendants have admitted that "textbooks . . . are essential to a quality educational program and a necessary and basic tool in the education of youngsters."

Curricula not keyed to textbooks are advocated by some educators and have been put into practice in some private and public schools. But defendants do not dispute that New York's own public education system continues to rely extensively on the traditional method of teaching from texts. Children without the benefit of these texts, one must imagine and as affidavits before us aver, are afforded a markedly inferior education during their early years of schooling than are their non-indigent peers. The psychological and social impact of the badge of inferiority implied by their disfavored treatment must extend far beyond the classrooms and aggravate to an incalculable degree other disadvantages these indigent students must in our society inevitably struggle against as a result of the financial straits of their parents. The enduring lesson they are thus taught in the public schools they attend without books is that wealth breeds favored treatment while disadvantage leads on to still greater handicaps.

In short, the legislative scheme here creates two classes of children, not physically separate yet unequal—the poor suffer while the rich receive the full benefits of the state's educational program. But "[l]ines drawn on the basis of wealth or property, like those of race . . ., are traditionally disfavored." *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966).

In *Boddie* v. *Wyman*, 401 U.S. 371 (1971), decided this term, the Court struck down a Connecticut statute that required the payment of an average $60 in court fees and costs as a prerequisite to obtaining a divorce on the ground that the fees effectively barred some indigents from dissolving their marriage contracts. The fees required by New York here as a prerequisite to the distribution of textbooks, according to evidence presently in the record, range from $6.00 to $58.50 per household, and effectively bar plaintiffs' children from receiving an adequate public education.

The majority attempts to dismiss *Boddie* in a footnote by labelling it a "due process" rather than an "equal protection" case. But *Boddie* is grounded on the "basic position of the marriage relationship in this society's hierarchy of values." Only "through the looking glass" might one rank a child's interest in education lower on the scale of this nation's traditional values than an adult's interest in a divorce.

The majority's similar disposal of *Griffin* v. *Illinois*, 351 U.S. 12 (1956) in the same footnote with *Boddie* as only another "due process" case is even more unavailing, for that decision rested by its own language squarely on the equal protection guarantee, as well as on due process, holding that a state may not deny a free transcript to an indigent where necessary to take a direct appeal from a criminal conviction. The court's observation in *Griffin* that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color," id. at 17, applies with equal force to the fundamentally important institution of public education. See also *Douglas* v. *California*, 372 U.S. 353, 355 (1963). Failure to appoint free counsel for an indigent's first appeal as of right from state criminal

conviction is unconstitutional "discrimination against the indigent."

Entirely apart from Supreme Court precedent, today's decision is strikingly inconsistent with a recent decision of this court. *McMillan* v. *Board of Education*, 430 F. 2d 1145 (2d Cir. 1970), requiring that a three-judge court be convened to consider plaintiffs' claim that their poverty would not permit them to take advantage of the state's offer to pay $2,000 toward the tuition of special private schools for handicapped children. Plaintiffs in *McMillan* alleged they were ineligible for the stipend because they could not afford the difference between the grant and full tuition. *McMillan* was a less compelling case than is this one for convening a three-judge court, since the state's usual public education facilities were open to plaintiffs' children on an equal basis with other children. In *McMillan*, the students were unable to make full use of these facilities because of their own physical handicaps. Here the state itself has artificially handicapped indigent children by denying them school books provided to others who can afford them.

It will not do to say, as does the majority, that in this case "public funds are distributed equally." The same argument would apply if schools charged a toll to defray the cost of operating public school buses. Were indigent children denied entry to the bus that passed their doors each morning because they could not bear their share of the cost—and thus were barred from public schools attended by their richer neighbors—would the answer also be "equal expenditures and an offer on equal terms to each child is sufficient"?

Here, as in *McMillan*, the essence of the claim is unequal educational opportunity based on wealth. The state has not justified the inequity sufficiently to warrant the refusal to convene a three-judge court.

LETTER FROM HELEN SERENSKY, PRINCIPAL TO PARENTS, Dated August 31, 1970 (Appended to Plaintiffs' Complaint)

MARIAN DELANEY PRIMARY SCHOOL
307 EAGLE AVENUE
WEST HEMPSTEAD, N. Y. 11552

August 31st 1970

Dear Parents

I am hopeful that your summer has been a most happy and healthy one.

As you have been advised, we are now operating on an austerity budget. I am enclosing the necessary information you will need to ascertain the fees that have been determined for your child's textbook rental, workbooks and other materials for the school year (1970-71).

I am also enclosing a note to your child and a small tag for him to wear to school.

Thank you for your cooperation.

Very truly yours,

HELEN SENESKY
Principal

HS;as
Encs.

FEE SCHEDULE—TEXTBOOK RENTAL—WEST HEMPSTEAD PUBLIC SCHOOLS (Appended to Plaintiffs' Complaint)

West Hempstead Public Schools
West Hempstead, N. Y. 11552

The fees per pupil in the elementary schools for the school year (1970-1971) for textbooks, workbooks, other materials and supplies for the various grades are shown below:

	Text-books (rental)	Work-books	Duplicating Paper, Misc. Supplies	Materials	Total
Kindergarten	$ —	$3.00	$ —	$3.00	$ 6.00
Grades 1, 2, 3, 4	7.50	6.00	1.00	3.00	17.50
Grades 5, 6	7.50	4.00	1.00	3.00	15.50

Fees are due and payable on the first day of school. Payment by check is preferred. Checks should be made payable to *Treasurer, U.F.S.D. #27, West Hempstead.* Each teacher will issue receipts so separate checks should be made for each child. If sending check, or cash (exact amount) with child, please place in an envelope with child's name and room number on it.

Children will furnish their own general supplies: pens, pencils, erasers, etc.

aks

LETTER FROM BENEDICT J. VALENTINE, PRINCIPAL TO PARENTS (Appended to Affidavit of Plaintiff FORESTINE PRESSY)

CHESTNUT STREET SCHOOL

IV-1-8922

Dear Parents:

I am saddened, just as you, at the realization that we begin our new school year under an austerity budget. But begin we must, and we here at Chestnut Street are going to look past the admitted hardships of such a budget and work towards giving the children the very best education within our power.

School begins on Wednesday, September 9, 1970. For grades 3 and 4, this first day will end at 11:30, at which time the children will be dismissed.

Starting on Thursday, there will be two lunch periods. Fourth graders will eat from 11:25-12:15; third graders from 12:20-1:10.

Regarding kindergarten—the morning session starts at 8:45 and ends at 11:50. The afternoon session starts at 12:30 and ends at 3:00. At mid year the sessions are reversed. Please note, however, that *for the first eight days (Sept. 9-Sept. 18)* the following shortened hours are in effect:

AM session—8:45-10:30 PM session—12:30-2:00.

Your child has been assigned to AM
4th Gr. Room .... 3rd Gr. Room 116 Kgn. Room .... PM

All children will report directly to their classes *after* 8:30. We will have adequate personnel on hand to direct children who are not familiar with our floor plan.

If you should find this letter opened and resealed, it is because we had a different letter all prepared to send before the austerity budget changed our plans.

Enclosed you will find the schedule of fees required under an austerity budget.

Speaking for entire staff, I express a wish for a very fruitful and pleasant relationship during the coming year.

Cordially,

BENEDICT J. VALENTINE
Principal

BJV/ak
Enc.

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SUPREME COURT OF THE UNITED STATES

No. 71-5685

DAISY JOHNSON, ET AL., PETITIONERS

v.

NEW YORK STATE EDUCATION DEPARTMENT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 22, 1972

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In the
Supreme Court of the United States

October Term, 1971

No. 71-5685

DAISY JOHNSON, ET AL., PETITIONERS,

v.

NEW YORK STATE EDUCATION DEPARTMENT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND EDUCATION HARVARD UNIVERSITY, AND THE UNITED MINISTRIES IN PUBLIC EDUCATION, IN SUPPORT OF THE PETITION

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Harvard University

The United Ministries
in Public Education

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Hunt, *The Challenge of Incompetence and Poverty, Papers on the Role of Early Education,* (University of Illinois Press, 1969) 36

Kirp, *The Poor, the Schools, and Equal Protection,* 38 Harv.Ed.Rev. 635 (1968) 18

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5685

DAISY JOHNSON, ET AL., PETITIONERS,

v.

NEW YORK STATE EDUCATION DEPARTMENT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND EDUCATION HARVARD UNIVERSITY, AND THE UNITED MINISTRIES IN PUBLIC EDUCATION, IN SUPPORT OF THE PETITION

Introduction

We present this brief in support of the petition for a writ of certiorari with the consent of all parties, pursuant to Supreme Court Rule 42(1).[1] We rely on the petitioners'

[1] Copies of the three letters of consent are attached to our covering letter to the Clerk of this Court.

treatment of this Court's jurisdiction, the questions presented for review and the constitutional and statutory provisions involved in this case.

The opinion of the district court dismissing the complaint is reported as *Johnson* v. *New York State Education Department,* 319 F. Supp. 271 (E.D.N.Y., 1970). The decision of the Court of Appeals affirming the district court's decision, Circuit Judge Irving Kaufman dissenting, is unreported. We cite the official slip opinion, copies of which we have furnished.

Interest of the Amici

The Center for Law and Education, Harvard University, was formed in 1969. Sponsored jointly by the Harvard Law School and the Harvard Graduate School of Education, the Center is funded by the United States Office of Economic Opportunity to work with local legal service offices and other attorneys on behalf of the poor, to promote reform in education. Center attorneys have worked on problems in the following areas: school fees (about which we have received numerous inquiries); student rights; resource allocation, within and between school districts; "ability grouping" practices; racial discrimination; and federal programs, particularly Title I of the Elementary and Secondary Education Act of 1965. The Center publishes a bulletin, *Inequality in Education.*

Center personnel have participated in significant litigation; done research and writing; drafted legislation; and negotiated with public officials. The Court of Appeals entered orders in this case accepting a brief and a reply brief, *amicus curiae,* filed by the Center. The Court's opinion referred to these briefs.[2] In the October, 1970 term, this Court

[2] "In addition to the briefs of the parties, this court has the advantage of a well-prepared brief and reply brief submitted by the Center for Law and Education of Harvard University." (Slip Op. at 4650.)

accepted an *amicus curiae* brief prepared by Center attorneys in the cases involving aid to parochial schools. See *Lemon* v. *Kurtzman*, 91 S.Ct. 915.

The Center's affiliation with the Harvard Graduate School of Education facilitates our presenting to courts educational data which is material under governing legal principles. In this brief, we present such data bearing upon the "interests of those who are disadvantaged by the [challenged] classification." *Kramer* v. *Union Free School District*, 395 U.S. 621, 626.

The United Ministries in Public Education (UMPE) was created by a group of agencies of the Episcopal Church, Presbyterian Church of the United States, the United Church of Christ, and the United Presbyterian Church, U.S.A., to serve as a joint agency of these religious communions. Its purpose is to assert that the Church is a vital force in our society and as such must accept its accountability for education. The UMPE serves to support the public educational system where it is contributing to the humane development of persons and to call for reevaluation of the system where needed. The UMPE works in coalition with others for the reform of educational policy and practice where necessary.

The stated goals of this program cover a wide spectrum of concerns for equalized educational opportunity for all. The goals specifically include an endorsement of support of litigation seeking to equalize educational opportunity by challenging special tax measures and tax allocation formulas for public education which perpetuate inequality of opportunity.

Statement

Parents of elementary school students in Union Free School District No. 27, Town of Hempstead, began this action. They alleged, *inter alia*, that the denial of textbooks to their children because of their indigency violated the equal protection clause of the Fourteenth Amendment. (App. at 13-14; Third Claim.)[3] They prayed, in part, for an injunction against enforcement of Section 701 of the New York Education Law, and such "alternative relief as the Court may deem to be just and appropriate." (App. at 15-16.) The district court dismissed the complaint for failure to state a claim, without holding an evidentiary hearing, and the Court of Appeals affirmed, Judge Kaufman dissenting.

The Answer of the defendant local school officials, the Superintendent and School Board of District 27, forthrightly admits, in our view, that the challenged statutory scheme for textbook distribution denies the equal protection of the laws:

> 12. Admit that the denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks. (App. at 46.)

This admission is fully supported by the other facts of record, briefly summarized as follows:

1. Under the statutory scheme,[4] the system in 1970-71

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[3] Our citations are to the appendix "printed for the use of the court below. . . ." Supreme Court Rule 21 (2).

[4] Throughout this brief we refer to the "statutory scheme," with the following meaning: 1) Section 701 of the New York Education Law requires districts to lend textbooks free to students in grades 7-12. 2) Section 703 of the New York Education Law requires districts

(and again in 1971-72 as shown by the Petition) provided free texts to students in grades 7 to 12, but required payment of a $7.50 fee by all students in grades 1 to 6, regardless of the economic status of their families. (Admitted; App. at 8, 45.)

2. The named plaintiffs had a total of five children enrolled in grades 1-3 in the system. (App. at 25, 28, 30.)

3. The Complaint alleged that "[p]laintiffs, recipients of public assistance, are indigent and cannot pay [the] fee." (App. at 4, 9-10.) While the local defendants generally denied this allegation (App. at 45), the named plaintiffs made uncontroverted affidavits, filed in the district court, that they were unable to pay the fee. (App. at 26, 29, 31.)

4. "Children who did not bring the fees demanded were denied text-books . . . ." (Admitted; App. at 8, 45.)

5. The Complaint alleges that in view of plaintiffs' inability to pay the fee "[t]heir children are hence being denied essential text-books, which are nonetheless available to other similarly situated but more wealthy children, and hence receive a significantly inferior education solely because of plaintiffs' indigency."[5] (App. at 4-5.) This allegation is established by the record. In addition to the admission by the local defendants in paragraph 12 of the Answer quoted above, their papers filed in the courts below contain the following statements:

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to lend textbooks free to students in grades 1-6, *only if the voters approve a tax for this purpose.* 3) When, as in this school district in 1970-71 and 1971-72, the voters do not approve this real estate tax for texts for grades 1 to 6 and other purposes, the district can still levy a tax for "ordinary contingent expense." (N.Y. Education Law, Sec. 2023.) 4) Opinion Number 213 of the Counsel to the Education Department, July 6, 1967, holds that expenditures for texts for grades 1-6 are not an "ordinary contingent expense." 5) Accordingly, the district provided texts free to grades 7-12, but charged a fee for grades 1-6. (See Slip Op. at 4647-4649.)

[5] In his dissenting opinion in *Board of Education* v. *Allen*, 392 U.S. 236, 252, Mr. Justice Black stated: "Books are the most essential tool of education, since they contain the resources of knowledge which the educational process is designed to exploit."

> We believe . . . that textbooks for all pupils are essential to a quality educational program and a necessary and fundamentally basic tool in the education of youngsters.
>
> Affidavit of School Board President Donald J. Siskind, September 23, 1970. (App. at 52.)

> The denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks.
>
> Affidavit of Superintendent Edward Moyer, September 25, 1970 (App. at 53.)

> The defendant Board of Education believes that textbooks for all pupils are essential to a quality educational program and a necessary tool in the education of youngsters.
>
> Brief of local defendants in Court of Appeals at 3.

In the District Court, the plaintiffs presented the affidavit of Dr. Gerald G. Glass, Professor of Education and Director of the Reading and Study Center and Graduate Program in Reading at Adelphi University. It reads, in part, as follows:

> No education program can exist without books. It is professionally unthinkable to assume that an educational program of even the meagerest scope would not minimally include books. Books of all kinds, readers, workbooks, trade books, reference books, et al. The process of education, as conceived in this country, assumes that persons must 'learn' not only from their own relatively narrow, actual experiences, but also from that extensive dimension that can only be offered through books. (App. at 40-41.)

> In fact, in my opinion a good case could be made for the grade school as having more pertinent requirements for text-books. Because the early school years are the formative school years a wealth of material needs to be applied to offer the youngsters reinforcement for learning. It is not uncommon that a textbook in the primary grades serves as the major structure for the whole curriculum in any one subject. (App. at 42.)

6. The Complaint alleged, in part, (App. at 15):

> (XII) (b) Indigent children sitting, bookless, side by side in the same classroom with other more wealthy children learning with purchased text books engenders a widespread feeling of inferiority and unfitness in poor children and is psychologically, emotionally and educationally disastrous to their well-being.

While affirming the district court's dismissal of the action, the Court of Appeals majority described this allegation as "quite [realistic]," a position with which Circuit Judge Kaufman dissenting agreed. (Slip Op. at 4649, 4670.)

In summary, this case involves a shocking situation: the challenged statutory scheme requires poor children to attend school without an "essential" educational tool, for reasons wholly beyond their own control; as a direct consequence, they are denied an educational opportunity equal to children from more affluent families, and stigmatized; and all this occurs in a nation whose Constitution guarantees "the equal protection of the laws" and whose president proclaims:

> Economic, educational, social mobility — all these, too, are essential elements of the open society. When

> we speak of equal opportunity we mean just that: that each person should have *an equal chance at the starting line,* and an equal chance to go just as high and as far as his talents and energies will take him.
>
> Statement by the President [Nixon] on Elementary and Secondary School Desegregation, March 24, 1970, at 17. (emphasis added.)

Summary of Argument

1. The motion to dismiss was erroneously granted, given applicable decisions of this Court with which the ruling below conflicts, whether plaintiffs' claim that the statutory scheme denies Fourteenth Amendment rights to indigents is deemed to require a three-judge court, or merely to challenge an application of the legislative scheme. (See discussion at 14-15.)

2. The Second Circuit's ruling conflicts with the decision in *Williams* v. *Page,* —— F. 2d —— (C.A. 7, June 9, 1971), petition for certiorari filed, August 31, 1971, No. 71-313. In reversing the district court's dismissal of a Fourteenth Amendment challenge by indigent students to fees for graduation-related acivities, the Seventh Circuit used a standard which would require an "evidentiary hearing" in this case. (See discussion at 12-13.)

3. The court below found a rational basis for the challenged classification and approved the district court's conclusion that it was supported by a compelling state interest. Each determination conflicts with applicable decisions of this Court. [See points (5) and (6) of Summary.] We submit that the compelling state interest standard should be employed here because the legislative scheme burdens ed-

ucation a "fundamental interest", and creates a "suspect" wealth classification. The decisions of this and other courts, the pronouncements of public officials, the objective treatment of education by Congress and the states and its general importance to the individual and society warrant classifying education a "fundamental interest." This would not require the recognition of a federal constitution right to an education. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 665. In many cases this Court has treated as "suspect" classifications having an *impact* on wealth lines. Moreover, here the lower court acknowledged that poor children would be stigmatized, similarly, we submit, to black students in the dual system; and poor children "are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate." *Graham* v. *Richardson*, 91 S.Ct. 1848, 1852. (quoting *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4). (See discussion at 15-22.)

4. The ruling below conflicts with a series of decisions of this court on the scope of the Fourteenth Amendment beginning with *Griffin* v. *Illinois*, 351 U.S. 12 and *Douglas* v. *California*, 372 U.S. 353. In these cases this Court has held that the Fourteenth Amendment requires a state to provide an indigent criminal defendant a document such as a transcript, or an attorney, vital to adequate use of a remedial procedure fully available to more affluent persons. Here, the impact of the challenged statutory scheme parallels *Griffin-Douglas*: a vital interest is at stake (education), and students from indigent families are admittedly denied an educational opportunity equal to students from more affluent families. Accordingly, we submit, the constitutional principles applied in *Griffin-Douglas* require the state to provide texts to indigent students (so long as the state con-

tinues to make books an essential element of the educational process).

The court below erroneously construed *Griffin-Douglas*. First, it said that they were solely due process cases; but see *Williams* v. *Illinois*, 399 U.S. 235, 241. Second, the lower court concluded that in this case state funds are being used to benefit all students, including indigents, with discrimination resulting from private supplements. Similar contentions in *Griffin* and *Douglas*, raised *in dissent* by Justice Harlan, were rejected by the majority which held that the Fourteenth Amendment required more than such "neutrality". This Court has recognized that further action is also required by the Fourteenth Amendment to secure equal educational opportunity. We show that it is not a material distinction that this case involves education rather than the criminal process. Finally, this Court's rulings invalidating fee requirements for voting (*Harper, supra*) and commencing divorce litigation (*Boddie* v. *Connecticut*, 91 S.Ct. 780) also demonstrate the substantiality of plaintiffs' claim. (See discussion at 23-29.)

5. The district court's application of the compelling interest standard, approved by the court below, conflicts with decisions of this court. No doubt because of its failure to hold an "evidentiary hearing", the district court did not consider several concrete, alternative methods, free of the harmful effects of the challenged scheme, for achieving the state's interests. The court below approved a scheme whereby resources are conserved by "invidious distinctions between classes of citizens". *Graham* v. *Richardson*, 91 S. Ct. 1848, 1853. Finally the lower court failed adequately to weigh the interests of the indigent students disadvantaged by the challenged scheme. *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 209-212. The evidence as to the inter-

ests of poor, elementary students is overwhelming. (See discussion at 29-37.)

6. The challenged classification satisfies neither branch of the standard articulated in *Dandridge* v. *Williams*, 397 U.S. 471, 487 ("rationally based and free from invidious discrimination".) It is completely irrational to further two of the purported state interests — conserving resources and maximizing the impact of state aid — by providing texts to the children of the wealthy in grades 7-12 and denying them to children of the poor in 1-6. There is invidious discrimination: poor children are required to attend school, admittedly denied an essential educational tool and equal educational opportunity, and stigmatized, for reasons wholly beyond their own control. Moreover, there are available alternative schemes, avoiding these consequences, which must be considered even if the compelling interest standard doesn't apply. *Carrington* v. *Rash*, 380 U.S. 89, 95-96. (See discussion at 37-40.)

7. The statutory scheme denies due process of law by arbitrarily infringing the interest of indigent children in an education. *Meyer* v. *Nebraska*, 262 U.S. 390; *Williams* v. *Illinois*, 399 U.S. 235, 259-266 (Harlan, J., concurring). There are less onerous alternatives for achieving the purported state interests; and, in certain respects, the statutory scheme is irrational. In addition, the lower court agreed that poor children could be stigmatized. *Wisconsin* v. *Constantineau*, 91 S. Ct. 507. (See discussion at 40-43.)

8. Alternatively, the writ should be granted because this case presents important questions which have not been but should be settled by this Court. The questions are analagous, factually and in significance, to the ones resolved in *Griffin-Douglas*, *Harper* and *Boddie*. (See discussion at 43-44.)

Reasons for Granting the Writ

A. The Court of Appeals Decision in this Case Conflicts with the Ruling in *Williams* v. *Page*, —— F. 2d —— (C.A. 7, June 9, 1971)

The Second Circuit majority affirmed the district court's dismissal of the complaint in this case, explicitly rejecting plaintiffs' contention that the fee requirement for textbooks effectively denies poor children an educational opportunity equal to children from more affluent families in violation of the Fourteenth Amendment. (Slip Op. at 4659-4663.) The Second Circuit's decision is "in conflict with the decision of another court of appeals on the same matter" [Supreme Court Rule 19(1)(b)], the unanimous ruling of the Court of Appeals for the Seventh Circuit in *Williams* v. *Page*, —— F. 2d —— (June 9, 1971),[6] *reversing* 309 F. Supp. 814 (N.D. Ill., 1970). A petition for a writ of certiorari was filed in *Williams* on August 31, 1971, No. 71-313.

Williams v. *Page*, *supra*, is a Fourteenth Amendment challenge by elementary and high school students to the collection of fees as a condition for participation in graduation-related activities in public schools. The complaint alleges that as a consequence of the fee requirement the activities "are not available to the plaintiffs on equal terms because they are indigent." *Williams* v. *Page*, *supra*, 309 F. Supp. at 815. In dismissing the complaint in *Williams*, the district court reasoned similarly to the Court of Appeals here.

The court viewed *Griffin* v. *Illinois*, 351 U.S. 12 and *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, as limited to burdens on only "the most fundamental rights", and noted plaintiff's reliance on the language in

[6] The "order" deciding the *Williams* case is not reported. A copy is Appendix One of this brief.

Brown v. *Board of Education*, 347 U.S. 483, that education "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (*Id.* at 816, quoting *Brown I, supra* at 494.) The court held: "plaintiffs are not being denied the opportunity of an education on equal terms [everyone pays the same fee], rather they are potentially being deprived of free access to extra graduation activities." 309 F. Supp. at 816.

The Seventh Circuit's brief order reversing the dismissal of the complaint in *Williams* reads, in part, as follows:

> The complaint alleges that graduation participation is an essential part of a child's education and the complaint may be construed as claiming that in the schools concerned the activities for which the fees are required have been recognized by the school administrators, teachers, parents and students as integral parts of the school experience, from which indigent children are being excluded. Until these and related factual questions are explored at an evidentiary hearing, the precise contours of the constitutional rights which plaintiffs claim were violated are not readily discernible.

Application of the *Williams* standard would require an evidentiary hearing on the complaint in this case. To paraphrase the quoted language, the complaint herein alleges that "fees are required" for textbooks, "an essential part of a child's education", and as a consequence that "indigent children are being excluded." Moreover, in this case, the local defendants expressly admit that the statutory scheme operates to deny poor children an equal educational opportunity.[7]

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[7] The decision by the Court of Appeals in this case is also in conflict with a recent district court decision, *Chandler* v. *South Bend Community School Corporation*, C.A. No. 71 S 51 (N.D. Ind., Aug.

B. The Court of Appeals Decided Fourteenth Amendment Issues in a Way in Conflict with Decisions of this Court.

1. *Preliminary Statement: the Procedural Posture*

The procedural posture of this case is significant. The district court dismissed the complaint for failure to state a claim without requesting that a three-judge court be convened, even though the complaint sought, in part, the enjoining of Section 701 of the Education Law. (App. at 15.) (See 28 U.S.C. 2281, 2284.) The Court of Appeals affirmed. The inquiry accordingly must focus on whether plaintiffs' claim is substantial. See *e.g. California Water Services* v. *City of Redding*, 304 U.S. 252, 255. We maintain that it is, given past decisions of this Court with which the ruling below conflicts, and the requirement that on motion to dismiss the well-pleaded allegations of the complaint and affidavits must be taken as true.[8]

The majority below suggested that this might not be a proper case for a three-judge court. (Slip Op. at 4660, n. 8.) However, even if the lower court viewed the case as involving only an application of the statutory scheme,[9] not requiring a three-judge court, the motion to dismiss should have been denied.

26, 1971), holding that it violates the Fourteenth Amendment to suspend a *student* for three days because of the failure of his *parents* to pay a school fee. The thrust of the decision is that education is a fundamental right, and that a student's right to an education can not be conditioned on factors over which he has no control.

[8] *Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 172 (1967); *Cooper* v. *Pate*, 378 U.S. 546.

[9] The complaint challenges, *inter alia*, the application of the statutory scheme to indigent students. (App. at 13-14; Third Claim.) See also *Boddie* v. *Connecticut*, 91 S.Ct. 780, 787, and the dissenting opinion of Judge Kaufman below. ("I dissent and would hold that plaintiffs have established at the very least a substantial claim that *as applied* in . . . District No. 20 . . . New York Education Law §703 deprives indigent children of the equal protection of the laws." (Slip Op. at 4663-4664; emphasis added; footnote omitted.)

Given the allegations of the complaint and affidavits, the admissions of the local defendants and pertinent substantive case law, it can not be said that "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle them to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46; 2A Moore's Federal Practice, § 12.08, at 2271-74 (2d ed., 1968), quoted in *Williams* v. *Page*, —— F. 2d —— (C.A. 7, 1971), discussed above at 12-13.[10]

The three-judge court procedure may not be working as originally envisioned.[11] However, frustration at the process can not be a basis for penalizing plaintiffs whose claims satisfy the standard for convening the statutory court.

2. *The Standard for Reviewing the Challenged Classification.*

Each of the lower courts considered the standard of equal protection review applicable in this case, *i.e.*, "rational relationship to a legitimate state end" (*McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 809), or "necessary to promote a compelling state interest." *Kramer* v. *Union Free School District*, 395 U.S. 621, 627. The district court purported to apply the compelling interest standard, finding it satisfied. (319 F. Supp. at 278.) While approving this conclusion, the Court of Appeals held that decisions

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[10] Finally, the court below suggested that it might be necessary for plaintiffs to amend the complaint "to attack the constitutionality of the voter's action." (Slip Op. at 4660, n. 8.) However, plaintiffs did allege the voter's action and challenge the statutory scheme as denying Fourteenth Amendment rights to indigent students. (App. at 7, 12-13.) This surely was adequate. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 46.

[11] See the discussion by the majority and Judge Kaufman below. (Slip Op. at 4650-4655, 4664-4666.)

of this Court "would indicate that [the rational basis] standard . . . is also appropriate in cases such as this." It then upheld the challenged statutory scheme. (Slip. Op. at 4655-4656, 4656-4663; explanation added.)

We demonstrate below that the lower courts applied each standard "in a way in conflict with applicable decisions of this court; . . ." Supreme Court Rule 19(1)(b). We wish to stress at the outset, however, our view that the challenged statutory scheme should be judged by the compelling state interest test. It "must be closely scrutinized and carefully confined" (*Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 670) because, as the local defendants admit, the classification at issue burdens *education*, a "fundamental interest", and draws lines based upon *wealth*, a "suspect" classifying factor.

a) *Education is a "fundamental interest"*

In 1954, this Court unanimously stressed the fundamental importance of educational opportunity in *Brown* v. *Board of Education*, 347 U.S. 483, 493.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is

> denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

During the October, 1970 Term, the Court reiterated this view on the importance of education, quoting from the same part of *Brown I* in *Palmer* v. *Thompson*, 91 S. Ct. 1940, 1943, n. 6.[12] In this case, despite ruling against plaintiffs, the Court of Appeals majority characterized education as "no doubt an area of fundamental importance" (Slip Op. at 4661), a conclusion with which Circuit Judge Kaufman dissenting agreed. (*Id.* at 4667-4669.)

Other lower federal courts have recognized that education is a "fundamental interest". In *Hosier* v. *Evans*, 314 F. Supp. 316 (D. Vir. Is., 1970), the court invalidated, on equal protection grounds, a regulation permitting the exclusion from school of "non-immigrant visitors". In stressing the importance of education, District Judge Christian stated (*Id.* at 319): "We are here dealing with an aspect of twentieth century life so fundamental as to be fittingly considered the corner stone of a vibrant and viable republican form of democracy, such as we so proudly espouse, *i.e.*, free and unrestricted public education." The court rejected the government's argument that existing facilities would become overcrowded, writing: "The short answer to that argument is that *fundamental rights* guaranteed by the Constitution may be neither denied nor abridged solely

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[12] In *Palmer*, this court distinguished the closing of swimming pools involved in *Palmer*, and public schools in *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42 (E.D. La., 1960), *affirmed per curiam*, 365 U.S. 569, stating: "Of course that case [*Bush*] did not involve swimming pools but rather public schools an enterprise we have described as 'perhaps the most important function of state and local governments.' *Brown* v. *Board of Education* . . . ." *Palmer*, *supra*, 91 S.Ct. at 1943, n. 6; see also 1947 (concurring opinion of Blackmun, J.)

because their implementation requires the expenditure of public funds." 314 F. Supp. at 320. (emphasis added.)

In *Ordway* v. *Hargraves*, 323 F. Supp. 1155 (D. Mass., 1971), the court held impermissible a school board's exclusion from regular classes of a pregnant girl. In the course of the opinion, the district judge stated: "It would seem beyond argument that the right to receive a public school education is a basic personal right or liberty. Consequently the burden of justifying any school rule or regulation limiting or terminating that right is on the school authorities (citation omitted)." The court found no such justification. (*Id.* at 1158.)[13]

The California Supreme Court has recently considered statutory classifications touching upon education, and challenged on equal protection grounds. *Serrano* v. *Priest*, 487 P. 2d 1241 (1971). In an opinion, discussing its own decisions and those of this Court, commentaries[14] and other

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[13] See also *Van Dusartz* v. *Hatfield*, C.A. No. 3-71 Civ. 243 (D. Minn., Memorandum and Order, October 12, 1971), holding education a "fundamental interest" for purpose of determining appropriate standard of equal protection review. ["Education has a unique impact on the mind, personality, and future role of the individual child. It is basic to the functioning of a free society and thereby evokes special judicial solicitude. (Footnote omitted.) Mem. Op. at 7.] *Hargrave* v. *McKinney*, 413 F.2d 320 (C.A.5., 1969), *Hargrave* v. *Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970), *vacated and remanded on other grounds, sub nom. Askew* v. *Hargrave*, 401 U.S. 476; (". . . interests which may well be deemed fundamental . . . ." 413 F. 2d at 328); *Dixon* v. *Alabama*, 294 F.2d 150 (C.A. 5, 1961), holding due process requires notice and opportunity for hearing prior to expulsion of students from public college. ("It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens." *Id.* at 157, per Rives, J.)

[14] Commentaries support our position that education should be considered a "fundamental interest." Coons, Clune and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal. L.Rev. 305, 382-389 (1969); Kirp, *The Poor, The Schools and Equal Protection*, 38 Harv. Ed. Rev. 635,

pertinent factors, the court concluded: "We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest'." (487 P.2d at 1258; footnote omitted.)

Education is precious not only in its own right, but also because it provides the tools necessary for exercising other rights which this court has recognized as fundamental — voting (*Harper* v. *Virginia State Board of Elections*, 383 U.S. 663); speech (*Lovell* v. *City of Griffin*, 303 U.S. 444, 450); association (*NAACP* v. *Alabama*, 357 U.S. 449); and travel (*Shapiro* v. *Thompson*, 394 U.S. 618, 629-631).

"[E]ducation underlies the whole substance of the political process and is antecedent to voting in the orders of both time and cause. All political behavior inevitably must reflect the presence or absence and the quality of education. A man's understanding of public issues is a function of those communications which are intelligible to him." [15]

The courts' statements are not merely rhetoric; all of the other institutions of government reflect similar concern for education. The last four presidents of this nation have expressed agreement with the courts.[16] Congress has enacted legislation providing funding for educational programs.[17] Education is made compulsory for at least ten

642-645 (1968); Michelman, *The Supreme Court, 1968 Term, Foreward: On Protecting the Poor through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 28, 48 (1969).

[15] Coons, Clune and Sugarman, *supra* n. 14, at 368.

[16] *President Nixon:* 1969 U.S. Code Cong. and Adm. News at 2830 (Proclamation on American Education Week; September 26, 1969); *President Johnson:* 1968 Code at 4648-9 (Proclamation on American Education Week; August 29, 1968); 1965 Code at 1448-9 (Message on Education Act of 1965); *President Kennedy:* 1963 Code at 1450 (Education Message to Congress; January 29, 1963); *President Eisenhower:* 1958 Code at 5412 (Education Message).

[17] See *e.g.* Elementary and Secondary Education Act of 1965, 20 U.S.C. 236-244, 331, 332, 821-827, 841-848, 861-870, 881-885, National Defense Education Act of 1958, Title 20 U.S.C. and Johnson-O'Malley Act, Title 25 U.S.C.

years by New York and all but three of the other states.[18] New York's Constitution provides in Article XI, Section 1:

> The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.

And, in fiscal 1968, 35 percent of New York's state and local tax dollars were spent on public schooling.[19]

We note that it is not necessary to recognize a federal constitutional right to an education in order to classify education a "fundamental interest". In a series of cases, this court has held qualifications for voting in state elections violative of the equal protection clause of the Fourteenth Amendment by application of the more stringent standard of review. *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 670; *Kramer* v. *Union Free School District,* 395 U.S. 621, 627, 630; *Cipriano* v. *City of Houma,* 395 U.S. 701, 704; *Evans* v. *Cornman,* 398 U.S. 419, 422.

These cases rest not on a federal constitutional right to vote, but on the ground that "once the franchise is granted, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper, supra,* 383 U.S. at 665; see also *Kramer, supra,* 395 U.S. at 629.[20] Indeed, in *Harper,* while noting that "the

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[18] N.Y. Education Law, § 3205(1)(a); Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: Non-Constitutional Analysis*, 117 U. Pa. L. Rev. 373, 393-4, n. 74 (1969).

[19] Calculated from Advisory Commission on Intergovernmental Relations, State and Local Finances, Tables 8 and 12 (1969).

[20] Compare *Griffin* v. *Illinois*, 351 U.S. 12, 18. ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, *e.g.*, *McKane* v. *Durston*, 153 U.S. 684, 687-688 . . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."); and *Brown I*, *supra*, 347 U.S. at 494. ("Such an opportunity [of an education] where the state has undertaken to provide it, is a right which must be made available to all on equal terms.")

right to vote in federal elections is conferred by Art. I, § 2 of the Constitution," the Court found it unnecessary to decide whether "the right to vote in state elections" is conferred by the federal constitution. *Harper, supra,* 383 U.S. at 665. The challenged statutes were subject to more stringent review in these cases because voting was viewed as "fundamental" and "preservative of other basic civil and political rights" (*Harper, supra,* 383 U.S. at 667) and at the "foundation of our representative society." *Kramer, supra,* 395 U.S. at 626.[21] As we have shown, education is in the same position.

b) *Wealth is a "suspect" classifying factor*

Our contention that the statutory scheme must be judged by the compelling interest standard is buttressed by the fact that the admitted *impact* of the statutory scheme is to classify students based upon the affluence of their families. "Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored." *Harper* v. *Virginia State Board of Election Commissioners,* 383 U.S. 663, 668. [22] While rejecting plaintiff's claims, the court below agreed with plaintiffs' allegation that the statutory scheme would operate to stigmatize poor children (see Statement *supra* at 7), similarly to segregation based upon race

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[21] The court quoted from *Yick Wo* v. *Hopkins,* 118 U.S. 356 370 and *Reynolds* v. *Sims,* 377, U.S. 533, 561-62, respectively.

[22] See also *Griffin* v. *Illinois,* 351 U.S. 12; *Burns* v. *Ohio,* 360 U.S. 252; *Douglas* v. *California,* 372 U.S. 353; *Williams* v. *Illinois,* 399 U.S. 235; *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 807. ("[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, *Harper* v. *Virginia Board of Elections, supra,* two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. *Douglas* v. *California,* 372 U.S. 353 . . . ; *McLaughlin* v. *Florida,* 379 U.S. 184 . . .") (dictum).

in the dual system. See *Brown I, supra,* 347 U.S. at 494.[23] We note also that poor children, punished here for reasons wholly beyond their own control, "are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate." *Graham* v. *Richardson,* 91 S. Ct. 1848, 1852 (quoting *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153, n. 4).

In cases which we have cited, lower federal courts and the California Supreme Court have concluded that the more rigorous standard of review is particularly appropriate when a case involves both the interest in education, and wealth classifications. *Van Dusartz* v. *Hatfield,* C.A. No. 3-71 Civ. 243 (D. Minn., October 12, 1971) (Mem. Op. at 6, 8); *Hargrave* v. *Mckinney, supra* at 413 F.2d 328; *Serrano* v. *Priest,* 487 P.2d 1241, 1250-1259 (S. Ct. Cal., 1971). See also *Hobson* v. *Hansen,* 269 F. Supp. 401, 513 (D.D.C., 1967), *affirmed, sub nom. Smuck* v. *Hobson,* 408 F.2d 175 (D.C. Cir., 1969).[24]

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[23] In his dissenting opinion, Circuit Judge Kaufman stated: "In short, the legislative scheme here creates two classes of children, not physically separate yet unequal — the poor suffer while the rich receive the full benefits of the state's educational program. But '[l]ines drawn on the basis of wealth or property, like those of race . . . . , are traditionally disfavored.' *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 668 (1966)." (Slip Op. at 4670.)

[24] Our contention that, on the facts of this case, wealth is a "suspect" classifying factor is consistent with *James* v. *Valtierra,* 402 U.S. 137. The lower court in *Valtierra* held that Article XXXIV of the California Constitution violated the equal protection clause of the Fourteenth Amendment, focusing on the fact that *on its face* Article XXXIV "applie[d] only to 'low income persons' . . . ." (313 F. Supp. at 4.) In reversing this Court viewed plaintiffs' challenge as directed *to the face* of the provision: "[A]ppellees contend that Article XXXIV denies them equal protection because it demands a mandatory referendum while many other referendums only take place upon citizen initiative." (402 U.S. at 141-142.)

In contrast, the admitted *impact* of the statutory scheme here is to apportion educational opportunity along lines of wealth. *Valtierra*

3. *The Decision Below Conflicts with this Court's Rulings on the Scope of the Fourteenth Amendment in Griffin* v. *Illinois*, 351 U.S. 12, *Douglas* v. *California*, 372 U.S. 353 and *Subsequent Cases*

a) *The Fourteenth Amendment principles established in Griffin-Douglas* and subsequent *cases*

In *Griffin* v. *Illinois*, 351 U.S. 12, this Court held that the Illinois system of criminal, appellate review, challenged by indigent defendants because of its failure to provide for free trial transcripts in the circumstances of their case, violated the Fourteenth Amendment by denying them the "adequate appellate review accorded to all [with] money enough to pay the costs in advance." *Griffin, supra*, 351 U.S. at 18. The state "concede[d] that . . . petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors." *Griffin, supra*, 351 U.S. at 16.

This Court decided *Griffin* on the premise that Illinois was not required by the Federal Constitution to afford any appellate review. "But that is not to say that a state that does grant appellate review can do so in a manner that discriminates against some convicted defendants on account of their poverty." *Griffin, supra*, 351 U.S. at 18.[25] Finally, emphasizing its antipathy to wealth classifications,

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may suggest that facial racial classifications are more carefully scrutinized than those based upon wealth, but construing *Valtierra* to foreclose our argument on wealth classification requires acceptance of the proposition that this Court limited, *sub silentio*, more than 15 decisions holding practices having an *impact* along lines of wealth violative of the Fourteenth Amendment. (See cases cited *supra* at 21, n. 22, and *infra* at 23-25, 29.)

[25] It is clear, therefore, that the decision below cannot be supported by any right-privilege rationale. See also *Graham* v. *Richardson*, 91 S.Ct. 1848, 1853.

the Court stated: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin, supra,* 351 U.S. at 19.

Griffin has had a steady growth. For example, in *Douglas* v. *California,* 372 U.S. 353, indigent criminal defendants challenged an appellate court's failure to appoint counsel to present their appeals. The court relied upon a rule requiring such appointment only if it determined, after examining the record, that counsel would be helpful to the defendant or the court. This Court, viewing the procedure as one in which "the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot", held that "an unconstitutional line [had] been drawn between rich and poor." *Douglas, supra,* 372 U.S. at 357.

In six cases in addition to *Griffin* and *Douglas,* this Court has held violative of the Fourteenth Amendment procedures nominally available to all criminal defendants or accused persons, but actually available in a less adequate form to indigents because of their poverty.[26] Finally, in four cases, the *Griffin* principle has been applied in instances where some requirement imposed by the State made entirely unavailable to the indigent defendant a remedy fully open to more affluent persons. For example, in *Burns* v. *Ohio,* 360 U.S. 252, payment of a $20 fee was required to invoke the criminal, appellate jurisdiction of

[26] *Eskridge* v. *Washington State Bd.*, 357 U.S. 214 (free transcript for appeal only if trial judge concludes justice promoted); *Swenson* v. *Bosler*, 386 U.S. 258 (no provision for counsel to brief appeal of convicted indigent); *Draper* v. *State of Washington*, 372 U.S. 487 (free transcript for appeal only if trial judge makes certain findings); *Long* v. *District Court*, 385 U.S. 192 (no provision for free transcript for indigent's appeal from denial of habeas corpus petition); *Gardner* v. *California*, 393 U.S. 367 (no provision for free transcript of hearing denying habeas corpus petition, where a *de novo* hearing on petition in appellate court); *Roberts* v. *LaVallee*, 389 U.S. 40 (no provision for free transcript for indigent—accused of testimony of witnesses at preliminary hearing).

the Ohio Supreme Court. Since the remedy was fully available to more affluent persons, the Court held that the fee requirement was violative of the Fourteenth Amendment as construed in *Griffin*.[27]

During the past two terms, this Court has again demonstrated its antipathy to wealth classification. In two cases "[a]pplying the teaching of the *Griffin* case", the Court has held "that an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense." *Williams* v. *Illinois*, 399 U.S. 240, 241; see also *Tate* v. *Short*, 91 S. Ct. 668.

b) *The Court of Appeals erroneously construed Griffin-Douglas and their progeny*

There is a striking parallel between the pivotal facts in *Griffin-Douglas* and this case. (1) Plaintiffs have a right under state law to attend public school, as petitioners in *Griffin-Douglas* had a right under state law to appeal their convictions. (2) Here, as in *Griffin-Douglas*, something, unavailable to indigents,[28] is an essential tool for enjoy-

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[27] See also *Smith* v. *Bennett*, 365 U.S. 708 ($4 filing fee for appellate review of denial of habeas corpus petition); *Lane* v. *Brown*, 372 U.S. 477 (filing of transcript — available to indigent only on request of public defender — necessary for appellate jurisdiction to review denial of *coram nobis* petition); *Williams* v. *Oklahoma City*, 395 U.S. 458 (filing of "case made" in appellate court necessary to invoke jurisdiction to review criminal conviction).

[28] It is true that the Court of Appeals suggested that the "fixed allowance" plaintiffs received under New York's Welfare law "was intended to cover this as well as other contingent needs." (Slip Op. 4649, n. 3.) Of course the suggested intent of the law is irrelevant; whether or not the parents were able to pay the fee is a question of fact.

Since this case was decided on a motion to dismiss, plaintiffs' affidavits and allegations of their inability to pay the fees must be taken as true. See *e.g. Cooper* v. *Pate*, 378 U.S. 546; *Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 172.

ment of the right. (3) Without books, similar to an indigent without a transcript or an attorney, a student from an indigent family is denied the full benefit of the right "accorded to all [with] money enough to pay the costs in advance." *Griffin* v. *Illinois*, 351 U.S. 12, 18.

The equal protection clause is as clearly violated when the quality of education a child receives depends upon the affluence of his parents, as where "the kind of trial a man gets depends on the amount of money he has." *Griffin, supra*, 351 U.S. at 19. Indeed, in this case, unlike *Griffin*, children are punished for "no action, conduct or demeanor of theirs" (*Levy* v. *Louisiana*, 391 U.S. 68, 71), but instead because of their families' indigency wholly beyond their own control.

Despite the obvious parallels between *Griffin-Douglas*, their progeny, and this case, the lower courts rejected plaintiffs' povery claim. (The District Court did not even mention the claim.) We submit that the court below decided the Fourteenth Amendment issues "in a way in conflict with applicable decisions of this court; . . ." (Supreme Court Rule 19 (1)(b).)

The Court of Appeals rejected the poverty contentions because "[t]he reasoning of [the] cases [relied upon by plaintiffs] [29] is that the State is required to provide these services and access because to do otherwise would be to deprive indigents of due process. Obviously, though, due process is not involved here." (Slip Op. at 4661.) The court also argued that "such money as the School Board has to spend is being spent in such a way as to benefit all students (i.e. on teachers' salaries, building maintenance and the like). (footnote omitted.)" (Slip Op. at 4662.) Finally, while acknowledging that students whose families

[29] The court cited: *Boddie* v. *Connecticut*, 91 S.Ct. 780; *Griffin* v. *Illinois*, 351 U.S. 12; *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, 365 U.S. 708; *Gideon* v. *Wainwright*, 372 U.S. 335.

could afford texts would no doubt receive a better education, the court said that this was due to their own means and not because the State provided them more. (Slip Op. at 4663.)

Any surface plausibility of this reasoning does not withstand scrutiny. First, as noted by Judge Kaufman in dissent, *Griffin* "rested by its own language squarely on the equal protection guarantee, as well as on due process . . . ." (Slip Op. at 4751.) See *Griffin, supra,* 351 U.S. at 13, 18.[30] Second, no distinction can be made because this case involves education rather than the criminal process. The Fourteenth Amendment makes no such distinction between criminal and other matters and this Court has not so construed it.[31] The *Griffin* opinion emphasizes the importance of fairness in the criminal process, but education is at least as important, as our argument at pages 16-21 demonstrates. Moreover, education may serve to make unneeded protection in the criminal process.[32]

Third, it could have been argued in *Griffin-Douglas* where appellate review was nominally available to the indigent, as the lower court did here, that "such money as the [State had] to spend [was] being spent in such a way as to benefit all [defendants]", that is, on salaries for judges and clerks, building maintenance, etc., and that

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[30] See also *Griffin, supra,* 351 U.S. at 34 (dissenting opinion of Harlan, J.); and *Williams* v. *Illinois,* 399 U.S. 235, 241, explaining *Griffin* as finding "a violation of the Equal Protection Clause . . . .

[31] See *e.g. Boddie* v. *Connecticut,* 91 S.Ct. 780; *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663; *Brown* v. *Board of Education,* 347 U.S. 483.

[32] See Coons, Clune and Sugarman, *supra,* n. 14, at 362. ["Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of a democratic society . . . ." (footnote omitted.).] See also *Johnson* v. *Avery,* 393 U.S. 483, 487. ("Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." footnote omitted.)

to the extent the affluent defendant had a more adequate appeal, this was a result of a private supplement. In fact, similar contentions were urged *in dissent* by Justice Harlan in both *Griffin* and *Douglas*.[33] A majority of this Court held, however, that in certain contexts the Fourteenth Amendment requires more than simply facial neutrality.[34]

Strictly speaking, it would appear that in *Griffin-Douglas*, and this case, Fourteenth Amendment obligations could be satisfied by ways other than furnishing free a transcript, counsel or books. Thus, the state could release an indigent defendant [35] and the curriculum could be other than textbook orientated. However, to the extent that furnishing a transcript, counsel or books is the most likely state response, the affirmative action here is precisely analogous to *Griffin-Douglas*.

This Court has approved affirmative remedial action to provide equal educational opportunity. The *Brown I* opinion stated that the opportunity of an education "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown I*, *supra*, 347 U.S. at 483, 493. Thereafter, in *Griffin* v. *School Board of Prince Edward County, Va.*, 377 U.S. 218, 233, this Court held that the district court had the authority to direct public officials to exercise their power to raise funds adequate to operate a racially non-discriminatory school system. And finally, in the past term, the Court upheld unanimously the order of a district court which

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[33] *Griffin*, *supra*, 351 U.S. at 34; *Douglas* v. *California*, 372 U.S. 353, 361-362.

[34] "Dissenting opinions here argue that the Illinois law should be upheld since by its terms it applies to rich and poor alike. But a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Griffin*, *supra*, 351 U.S. at 18, n. 11; see also *Williams* v. *Illinois*, 399 U.S. 235, 242.

[35] "(3) The remedy for the discrimination is simple, clear and effective — *i.e.*, give the appellant a transcript (and a lawyer) or else let him go; . . ." Coons, Clune and Sugarman, *supra* n. 14, at 362.

required state officials to provide substantial, additional student transportation. *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1. See also *United States* v. *School District 151 of Cook County, Illinois,* 301 F. Supp. 201, 232 (N.D. Ill. 1969), *affirmed as modified,* 432 F.2d 1147 (C.A.7, 1970) *cert. denied,* 402 U.S. 943; *Hosier* v. *Evans,* 314 F. Supp. 316, 320 (D. Vis. Is., 1970).

Our contention that plaintiffs present a substantial claim is buttressed by decisions of this Court invalidating, on Fourteenth Amendment grounds, fees in two additional areas. In each case, the Court's opinion stressed the fundamental interest involved. See *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663; *Boddie* v. *Connecticut,* 91 S. Ct. 780. In striking down Virgina's $1.50 poll tax, this Court stated in *Harper*: "wealth or fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Harper, supra,* 383 U.S. at 670. The *Boddie* case involved fees for the commencement of divorce litigation. The Court held that the due process clause prohibited Connecticut from denying access to the courts to indigents seeking divorces in good faith, emphasizing "the basic position of the marriage relationship in this society's hierarchy of value. . . ." *Boddie, supra,* 91 S. Ct. at 784.

This case too, as we have shown, involves a fundamental interest. Here, as in *Harper,* "wealth or fee paying has . . . no relation to [an education]; the right to [an education] is too precious, too fundamental to be so burdened or conditioned."

4. *The Decision Below Conflicts with Rulings of this Court Applying the "Compelling State Interest" Standard of Review*

We maintain for the reasons set forth above that the challenged legislative scheme must be judged by the "com-

pelling state interest" standard. The district court purported to apply this test, finding it satisfied. (319 F. Supp. at 278.) The court reasoned that the classification was adequately justified by the adoption of a scheme which would, in the court's view: 1) advance the legislatures "legitimate interest in conserving the State's fiscal resources. . . ." (*Id.* at 279;) 2) insure "that as many as possible of [New York's] children receive textbooks" (*Id.* at 279-280;) and 3) fulfill "[t]he legislature's desire to foster the study of certain subjects [the sciences, mathematics and foreign languages]. . . ." (*Id.* at 280.)

The majority below approved the district court's conclusion on the compelling interest test (Slip Op. at 4655-4656), thereby incorporating the district judge's erroneous application of the standard.[36] The decision below conflicts with rulings of this court in three respects: 1) by failing adequately to consider the availability of less onerous alternatives for achieving the state's objectives; *Shapiro* v. *Thompson*, 394 U.S. 618, 631, 633-638; 2) by approving a scheme under which the state protects "the fiscal integrity of its programs" through "invidious distinctions between classes of citizens"; *Graham* v. *Richardson*, 91 S. Ct. 1848, 1853; and 3) by failing adequately to weigh "the interests of those who are disadvantaged by the classification" (*Kramer* v. *Union Free School District*, 395 U.S 621, 626), namely, indigent students without books.

a) *The treatment of alternatives for satisfying the state's interests*

The district court began its analysis correctly, recognizing by references to alternatives that the availability

[36] In approving the district court's compelling interest analysis, the court below referred specifically only to the legislative desire "to promote education in [certain] fields . . . ." (Slip Op. at 4655-4656.)

of a less onerous alternative for achieving the state's goal must be considered where the compelling interest test applies. (319 F. Supp. at 279.) The district judge erred, however, in giving full consideration to only one alternative, *i.e.*, "grants . . . spread thinly." (*Id.* at 279-280.) Expressing the view that texts for grades 7 to 12 are more costly than those for grades 1-6, Judge Travia stated that the alternative of "grants . . . spread thinly" among all students (grades 1 to 12) could, in view of the cost factor, result in a larger number of students being without books. (*Id.* at 280.) The court concluded that "New York State has a legitimate, compelling interest in seeing to it that as many as possible of its children receive textbooks." (*Id.* at 280.)

Plainly, there were other alternatives for satisfying the three state interests discussed by the courts below. First, apparently without additional expenditures, books could be provided without cost only to those students in grades 1 to 12 from indigent families, a practice similar to one used in the past in New York state.[37] Second, as plaintiffs pointed out in the Court of Appeals, state law could include texts for grades 1-6 in the definition of "ordinary contingent expenses" for which a local district can levy a tax even in the absence of voter approval. (See Plaintiffs' Brief below at 13-14, and see *supra* at 4, n.4.) [38]

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[37] Former Section 3209 of the Education Law, repealed by Social Services law Section 131a (Ch. 517, Laws of 1970), required welfare officials to "furnish indigent children with suitable . . . books, to enable them to attend" school. This provision was in effect as early as 1927. (See N.Y. Laws of 1928, Ch. 646, Section 627 F.) Moreover, the New York law to implement *Gideon* v. *Wainwright*, 372 U.S. 335, requires the appointment of counsel for persons "financially unable to obtain counsel. . . ." N.Y. Code of Criminal Procedure, Section 308.

[38] The majority below appears to have suggested that under *James* v. *Valtierra*, 402 U.S. 137, the state's right to involve the electorate in the financing process is unlimited. (Slip Op. at 4659-4660.) However, the inequity here cannot be justified by this rationale. "A citi-

Under each of these alternatives, costs to the state would apparently not be higher, and all students in grades 1 to 12, including those from indigent families, could have texts, the maximum possible impact. And, accordingly, each alternative would also foster development in the particular subjects to which the legislature referred.

It is settled that legislation abridging fundamental interests is invalid if there are such narrower means or less restrictive alternatives for accomplishing governmental purposes. *Kramer* v. *Union Free School District, supra,* 395 U.S. at 632; *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204, 212-213; *NAACP* v. *Alabama,* 377 U.S. 288, 307-308; *Shelton* v. *Tucker,* 364 U.S. 479, 488; *Shapiro* v. *Thompson, supra,* 394 U.S. at 631. "The breath of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker, supra,* 364 U.S. at 488.

The review of alternatives must be a searching one. *Shapiro* v. *Thompson, supra,* 394 U.S. at 633-8; see also *Carrington* v. *Rash,* 380 U.S. 89, 95-6; *Williams* v. *Illinois,* 399 U.S. 235, 244-5. The incomplete consideration of alternatives demonstrates the wisdom of the Seventh Circuit's decision in *Williams* v. *Page,* —— F.2d —— (1971), the case with which the Court of Appeals decision conflicts, requiring an "evidentiary hearing" on similar claims. Here, in the absence of such a hearing, the alternatives considered in the district court's opinion were those developed by court.

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zen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, 736-737; *Hall* v. *St. Helena Parish School Board,* 197 F. Supp. 649 (E.D. La., 1961), *affirmed per curiam* 368 U.S. 515 ("No plebiscite can legalize an unjust discrimination." 197 F. Supp. at 659.)

b) *The "fiscal resources" arguments*

There are three basic flaws in the district court's "fiscal resources" argument, approved by the Court of Appeals. First, we have noted above the availability of options which would apparently not involve additional expenditures, contrary to the assumptions of the district judge.

Second, the district court rejected consideration of any alternative involving increased expenditures. (319 F. Supp. at 279.) However, states have adopted new procedures involving expenditures of funds in response to many decisions of this Court. *Griffin-Douglas* and their progeny and the landmark decision in *Gideon* v. *Wainwright*, 372 U.S. 335, holding that counsel must be furnished to indigent criminal defendants in state proceedings — are obvious examples. Constitutional rights would be hollow if states could avoid implementation simply by pleading that expenditures were required.[39]

Third, the kind of classification involved here cannot be justified by the possibility of increased costs. In *Shapiro* v. *Thompson, supra,* 394 U.S. at 633, this Court stated:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of citizens. *It could not for example reduce expenditures for education by barring indigent children from its schools.* Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. *The saving of wel-*

[39] See also the discussion *supra* at 28-29.

fare costs cannot justify an otherwise invidious classification. (emphasis added; footnote omitted) [40]

Here, the saving of costs for education cannot "justify an otherwise invidious classification." The courts dictum on education almost precisely covers this situation. While children are not barred from school, they are, on this record, "barred" from an essential tool of an education.[41]

c) *The special interests of the children disadvantaged by the classification*

The governing standards, as we note above, require that great weight be given to the "interests of those who are disadvantaged by the classification." *Kramer* v. *Union Free School District,* 395 U.S. 621, 626; *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204, 209-212; *Evans* v. *Cornman,* 398 U.S. 419. Attention to this factor demonstrates that this is an even clearer case for application of the Fourteenth Amendment than *Griffin-Douglas* and their progeny, where the Court assumed only that the interests of the petitioners in the criminal process were the same as more affluent persons. Here, there is a sound basis for arguing that the "interests of those who are disadvantaged" by the challenged classification — children from indigent families in grades 1 to 6 — are stronger than those who have texts, other elementary students and students in grades

[40] The Court followed *Shapiro* during the past term in *Graham* v. *Richardson,* 91 S.Ct. 1848, 1853.

[41] Any reliance by the local defendants on the collection of fees to defray costs would not support a conclusion that the state interest is compelling. "We are thus left to evaluate the states asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment. Such a justification was offered and rejected in *Griffin* v. *Illinois,* 351 U.S. 12 (1956)." *Boddie* v. *Connecticut,* 91 S.Ct. 780, 788.

7 to 12. We take this position on the basis of legislation and literature which recognize both the critical importance of early childhood education and the need for special attention to the educational problems of the poor.[42]

First, in 1965, Congress enacted the Elementary and Secondary Education Act, Pub. Law 89-10. Title I of the law (20 U.S.C. 241a-241m) is a comprehensive program for providing federal financial assistance to local school systems with concentrations of children from low income families. The congressional declaration of policy in Section 241a begins by recognizing "the special educational needs of children of low-income families." School systems are required by the law, implementing regulations and other statements of governing criteria promulgated by the Office of Education to concentrate Title I programs in those attendance areas with "high concentrations of children from low income families. . . ." 20 U.S.C. 241 e (a) (1); 45 C.F.R. Part 116, § 116.17(d); United States Office of Education, ESEA Program Guide 44, March 18, 1968, § 1.1.[43]

Second, in April, 1970, Congress amended Title One in Pub. Law 91-230. Section 132 (a) recognizes the importance of projects at the elementary level, requiring, with certain exceptions, that Title One funds be used "in preschool programs and in elementary schools serving areas with

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[42] It is proper for the court to consider these materials, *Brown* v. *Board of Education*, 347 U.S. 483, 494, n. 11; *Skinner* v. *Oklahoma*, 316 U.S. 535, 545, n. 1 (concurring opinion of Stone, C.J.); *Griffin* v. *Illinois*, *supra*, 351 U.S. at 19; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 399; *Mapp* v. *Ohio*, 367 U.S. 643, 651-52, n. 7. Their use here seems particularly appropriate since plaintiffs need only show that their claims are substantial.

[43] The term "educationally deprived children", is defined to include "children who are handicapped or whose needs for . . . special educational assistance result from *poverty*, neglect, delinquency, or cultural or linguistic isolation from the community at large. 45 C.F.R. Part 116, § 116.1 (i) (emphasis supplied.)

the highest concentrations of children from low-income families. . . ." [44]

Third, available expert evidence supports the conclusion of the Congress.[45] It presents the following pertinent propositions: 1) a challenge to earlier notions of genetically determined and fixed intelligence — Hunt (1969, at 191-2); Bloom (1964, at 87-90); Bloom, Davis and Hess (1967, at 12); 2) a suggestion that there is considerable plasticity in intelligence in the pre-school and early elementary years — Bloom (1964, at 87-90; 126-9); 3) and accordingly, a suggestion that early education is critical — Bloom (1965, at 127-8); Bloom, Hess and Davis (1967, at 12, 16, 22); Hunt (1969, preface at VIII). It is noteworthy that both Hunt (1969, at 209) and Bloom, Hess and Davis (1967, at 30) refer to the absence of books in the home as one of the underlying causes of the educational deficiencies exhibited by poor children.

The expert evidence also appears to support plaintiffs' contention that the book distribution procedure will adversely affect poor children "psychologically [and] emotionally. . . ." (App., 15.) Many children from culturally deprived families begin school not having had adequate

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[44] The Report of the Senate Committee on Labor and Public Welfare (Senate Report 91-634, 91st Congress, 2d Session) provides the following rationale for the amendment (at 20): "This requirement in part C was adopted by the Committee on the basis of growing evidence which indicates that the early years of education are of paramount importance in a child's development." The Report also states that Title I has focused federal monies "on what may well be the most crucial problem challenging our school systems today: how to educate successfully the children of America's poor." (*Id.* at 7.)

[45] See Benjamin S. Bloom, Allison Davis and Robert Hess, *Compensatory Education for Cultural Deprivation* (Holt, Rinehart and Winston, Inc., 1967) [cited: (Bloom, Davis, Hess, 1967)]; Benjamin S. Bloom, *Stability and Change in Human Characteristics* (John Wiley and Sons, Inc. 1964) [cited: Bloom (1964)]; J. McVicker Hunt, *The Challenge of Incompetence and Poverty*, "Papers on the Role of Early Education" (University of Illinois Press, 1969) [cited: Hunt (1969)].

opportunities for "stimulation, language development, and intellectual development. . . ." (Bloom, Davis, Hess, 1967, at 15). Their experience does not prepare them well for coping with the requirements of public schools. (*Id.* at 21.) This frequently means that "[a]s each year of school goes by, the culturally disadvantaged child suffers further frustration and failure." (*Id.*) It would appear clear that the situation involved in this case would aggravate the problem.

Thus, the particularly vital interests of indigent children in educational opportunities — especially books — during their elementary schooling adds further support to the substantiality of plaintiffs' case. Plainly, it can not be said these children are "substantially less interested" in books than those who receive them. *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204, 212.

5. *The Decision Below Is Not Supported by this Court's Ruling in* Dandridge *v.* Williams, *397 U.S. 471*

The Court of Appeals majority relied heavily on this Court's decision in *Dandridge* v. *Williams,* 397 U.S. 471, in rejecting plaintiffs claims. First, the court read *Dandridge* to establish that the compelling interest standard is inapplicable in the circumstances of this case. (Slip Op. at 4661-4662.) Second, the court below purported to apply the "reasonable basis" standard in accord with its application in *Dandridge.* (Slip Op. at 4656-4658.) *Dandridge* does not sweep so broadly.

First, this case is factually different from *Dandridge* because of the admissions of the local defendants as to the "essential" nature of texts, and the impact of their absence. At a minimum, there is a triable issue as to whether this situation involves, in practical effect, a *total denial* of education. *Dandridge,* in contrast, involved a *dilution* of wel-

fare benefits. In addition, unlike *Dandridge*, it is admitted that students are divided along lines of wealth, and the Court of Appeals agreed with plaintiffs' contention that this stigmatizes poor students, similarly to racial segregation in the dual system. Compare *Dandridge* v. *Williams*, *supra*, 397 U.S. at 485, n. 17; *Palmer* v. *Thompson*, 91 S. Ct. 1940, 1965-1966 (dissenting opinion of White, J.)[46]

Second, in *Dandridge*, this Court expressed the standard to be applied as follows: "It is enough that the State's action be rationally based *and* free from invidious discrimination." 397 U.S. at 487. (emphasis added.) The court below referred to "limited resources" (Slip Op. at 4658), identified the legislature's goal in the challenged scheme to be the fostering of certain subjects, termed its action "clearly justified in terms of the goals it sought thereby to advance" and concluded that the *Dandridge* standard was satisfied. (Slip Op. at 4658.) It inquired no further.

We submit that this analysis did not satisfy either branch of the *Dandridge* standard. First, each of the courts below referred to state efforts to conserve limited resources. From this viewpoint, the statutory scheme is completely irrational. A millionaire's children in grades 7 to 12 are furnished free texts, hardly a method of conserving resources. Meanwhile, children of the poor in grades 1-6 are denied an essential educational tool. Second, providing books to the children of the affluent in grades 7-12, but denying them to poor children in grades 1-6 does not maximize the impact of state aid, another stated objective. Third, students who must do without texts in the elementary grades will not be helped "in the fields of science, mathematics [and] foreign languages" by having texts in the secondary grades.

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[46] While we recognize the importance of the interests involved in *Dandridge*, the wealth classification and the impact on education make this an appropriate situation for application of the compelling interest standard, as we have shown above at 15-22.

There are other state policies which must be weighed in assessing the "rationality" of the legislative scheme. The policy manifested in New York's compulsory school attendance law [Education Law §3205(1)(a)] is not satisfied by having children sit bookless in the classroom. We note also that the legislature's statement of policy, from which the court identified the state's interest here, referred not only to promoting certain subjects, but also stated in part: "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. *This calls for more adequate educational opportunities and...* (promoting certain subjects) . . . ." (Quoted in Slip Op. at 4658; emphasis added.) Given all of these considerations, we do not believe that the scheme may be termed "rationally based."

It is clearer that the situation is not "free from invidious discrimination." The State requires plaintiffs to attend school. They are without essential books, and therefore, the local defendants admit, have a lesser educational opportunity than students from more affluent families. Further, the court below concedes, they may be stigmatized, similarly, we submit, to black students in the dual system. *Wisconsin* v. *Constantineau,* 91 S.Ct. 507, 510. None of this is due to any "action, conduct or demeanor of theirs . . . ." *Levy* v. *Louisiana,* 391 U.S. 68, 72.[47] And, finally, it would appear that there are alternatives which would both serve the state's interests and avoid these consequences. *Carrington* v. *Rash,* 380 U.S. 89, 95-96; *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349.[48]

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[47] See also *Chandler* v. *South Bend Community School Corporation,* C.A. No. 71S 51 (N.D. Ind., Aug. 26, 1971), the district court school fees case discussed above at n. 7; (". . . . Defendant herein has totally failed to present any reason why the plaintiff-students should incur sanctions for their parents' failure to pay school fees." Mem. Op. at 6.)

[48] Consideration of alternatives is proper. *Carrington,* like *Dandridge* written by Mr. Justice Stewart, held violative of the equal protection

If this is not "invidious discrimination," we are quite at a loss to know what is.

6. *The Statutory Scheme Denies Due Process Of Law*

The lower court's conclusion that this case presents no due process issues [49] conflicts with decisions of this Court recognizing that the due process clause does protect against arbitrary government infringment of important individual interests, including education. *Meyer* v. *Nebraska*, 262 U.S. 390; *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Bolling* v. *Sharpe*, 347 U.S. 497;[50] see also *Williams* v. *Illinois*, 399 U.S. 235, 259-266 (concurring opinion of Harlan, J.) Moreover, despite its view on the due process clause, the lower court expressed agreement with plaintiffs' allegation that poor children might be stigmatized in the operation of the statutory scheme. See *Wisconsin* v. *Constantineau*, 91 S. Ct. 507, 510.

In *Meyer*, this Court reversed the conviction of a teacher under a Nebraska law which forbid the giving of instruction in a language other than English to a student below the ninth grade. The Court stressed the importance of education and noted Nebraska's compulsory attendance law.

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clause a Texas Constitutional provision prohibiting a person moving to Texas while a member of the armed forces from voting in any state election while a member of the armed forces. The Court discussed alternatives which the state could employ to satisfy its purported objectives. 380 U.S. at 95-96. The opinion referred neither to the compelling interest standard, nor to a federal constitutional right to vote. It did refer to the importance of voting (380 U.S. at 94, 96), but the same is true as to education. See 16-21 above.

In *Dean Milk* this Court held inconsistent with the commerce clause an ordinance forbidding the sale of milk in Madison unless processed and bottled at an approved plant within five miles of Madison. The ruling was based, in part, upon the apparent availability of "reasonable and adequate alternatives . . . ." (340 U.S. at 354.) We submit that it is more appropriate to evaluate alternatives here where the critical personal interests of indigent students are involved.

[49] Slip Op. at 4661. ("Obviously, though, due process is not involved here.")

[50] See discussion above at 16-21 on the importance of the individual interest in education.

Meyer, supra, 262 U.S. at 400. The ruling rested, in part, on the premise that the law arbitrarily burdened "the opportunities of pupils to acquire knowledge" in violation of the due process clause. 262 U.S. at 401-403.[51]

Mr. Justice Harlan premised his concurrence in *Williams* v. *Illinois,* 399 U.S. 235, 259-266, on the due process clause, terming the issue whether the challenged legislation "arbitrarily infringes a constitutionally protected interest. . . ." 399 U.S. at 259.[52] Applying a standard expressed in his opinion,[53] he concluded that the Illinois procedure was violative of the due process clause.

This case involves a due process violation, given these controlling principles:

First, an important individual interest is significantly burdened. In *Meyer* "the opportunities of pupils to acquire knowledge" were infringed by a rule forbidding the teaching of foreign languages. Here, the burdening of the same interest results from the failure of the state to provide indigents an admittedly essential educational tool. The deprivation is more extreme in this case, extending to all elements of the curriculum in which books are used.

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[51] In *Bolling* v. *Sharpe*, 347 U.S. 497, this Court held that operation of a dual school system in the District of Columbia violated the due process clause of the Fifth Amendment. The Court concluded: "Segregation in public education is not reasonably related to any proper governmental objective, thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." 347 U.S. at 500.

[52] The majority held violative of the equal protection clause the Illinois procedure allowing imprisonment of an indigent criminal defendant, in default of payment of a fine, beyond the maximum authorized by the statute regulating the substantive offense. *Wililams, supra,* 399 U.S. at 241.

[53] ". . . the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen." *Williams, supra,* 399 U.S. at 260 (concurring opinion).

Second, there are significant questions about "the rationality of the connection between legislative means and purpose. . . ." *Williams* v. *Illinois, supra,* 399 U.S. at 260 (concurring opinion). Providing books to children of affluent families in grades 7-12 and denying them to poor children in grades 1-6 is a wholly irrational method of furthering the purported state interests of conserving resources and maximizing the impact of state aid. Further, New York's purpose can not be understood only by considering the laws immediately involved in this case. The denial of texts to children is entirely inconsistent with the policy manifested by the state's compulsory attendance law. [N.Y. Education Law § 3205 (1)(a).] Surely, the state interest reflected in § 3205 (1)(a) is not satisfied by having students sit bookless in the classroom.

Third, there is an asserted state interest in promoting development in certain subjects taught at the secondary level. We submit, however, that it is not such as to outweigh the impact of the challenged scheme on the critical interests of the plaintiffs [*Williams* v. *Illinois, supra,* 399 U.S. at 262-263 (concurring opinion)],[54] particularly in view of the apparent "existence of alternative means for effectuating the [state's] purpose[s] . . . ." *Williams,* supra, 399 U.S. at 260 (concurring opinion).[55]

Fourth, a student's interest in an education is a personal one. *Meyer,* supra, 262 U.S. at 401; accordingly, it is patently arbitrary for that interest to be burdened due to a circumstance over which the child has no control, the indigency of his family. See *Levy* v. *Louisiana,* 391 U.S. 68, 72;[56]

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[54] One commentary notes about *Meyer:* "The individual's interest in education is personal and important, important enough to subdue the arguably rational purpose of the state to democratize its children and thus to avoid the divisions of sect and creed." Coons, Clune and Sugarman, *supra* n. 15, at 376.

[55] See discussion of alternatives *supra* at 30-32.

[56] *Levy* was decided on equal protection grounds and we cite it above in support of our argument based on that clause. However,

Robinson v. *California*, 370 U.S. 660, 667 and n. 9; *Boddie* v. *Connecticut*, 91 S. Ct. 780, 788.[57]

Fifth, our due process contention is buttressed by the acknowledged stigmatization. *Wisconsin* v. *Constantineau*, 91 S.Ct. 507, 510. As Judge Kaufman stated in dissent below (Slip Op. at 4670):

> The psychological and social impact of the badge of inferiority implied by their disfavored treatment must extend far beyond the classrooms . . . . The enduring lesson they are thus taught in the public schools they attend without books is that wealth breeds favored treatment while disadvantage leads on to still greater handicaps.

This stigmatization is much more than simply the reflection of private inequality; it is directly attributable to the operation and interaction of the state's education laws in the schools which poor children are required by state law to attend. And unlike *Constantineau*, there is not even a claim of any attempted remedial benefit to those stigmatized.

C. Alternatively, the Court of Appeals Decided Important Questions of Federal Law which Have Not Been but Should Be Settled by this Court

We argue throughout that the court below decided federal questions "in a way in conflict with applicable decisions

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"the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling* v. *Sharpe*, 347 U.S. 497, 499.

[57] See also *Chandler* v. *South Bend Community School Corporation*, No. 71 S 51 (N.D. Ind., Aug. 26, 1971) ["The school fee collection procedure as applied to these minor plaintiffs, conditions *their personal* right to an education upon the vagaries of their parent's conduct, an intolerable practice condemned by this Court in *Carpenter, et al.* v. *Arnold*, 70 S 54 (1970)." [Mem. Op. at 6.]

of this court; . . . ." [Supreme Court Rule 19(1) (b).] However, this case can be viewed as presenting new questions. Accordingly, in the alternative, we submit that the Court of Appeals "decided an important question of federal law which has not been, but should be, settled by this court; . . ." (*Id.*) The fees at issue here present an important question just as the ones involving the criminal process, voting and divorce litigation did in *Griffin* and its progeny, *Harper* and *Boddie*.

Conclusion

For the reasons expressed in this brief and in the petition, this Court should agree to review the decision of the Court of Appeals for the Second Circuit in this case.

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The United Ministries
in Public Education

November, 1971

APPENDIX ONE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH DISTRICT

June 9, 1971

WILLIAMS, ET AL.

v.

PAGE, ET AL.

No. 18536

Appeal from the United States District Court for the Northern District of Illinois

Before: Swygert, Ch. J; Kiley, C.J., Fairchild, C.J.

O R D E R

This action for declaratory and injunctive relief and amages was brought pursuant to the Civil Rights Act of 71, 42 U.S.C. § 1983, and jurisdiction was claimed under U.S.C. §§ 1343, 2201, 2202, 2281, 2282 and 2284. Upon otion of the defendants and after receiving briefs of the arties, the district court dismissed the complaint and the use for failure to state a claim upon which relief could be anted.

The complaint alleges that graduation participation is essential part of a child's education and the complaint ay be construed as claiming that in the schools concerned e activities for which the fees are required have been cognized by the school administrators, teachers, parents d students as integral parts of the school experience, om which indigent children are being excluded. Until ese and related factual questions are explored at an evi-ntiary hearing, the precise contours of the constitutional ghts which plaintiffs claim were violated are not readily scernible.

As Professor Moore has stated the rule, "[A] complaint ould not be dismissed for insufficiency *unless it appears*

to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." 2A J. Moore, Federal Practice ¶ 12.08, at 2271-74 (2d ed. 1968). This is especially true in actions brought under 42 U.S. § 1983. *Escalera* v. *New York City Housing Authority,* 425 F.2d 853, 857 (2d Cir. 1970). Applying that standard to the instant complaint, the complaint should not have been dismissed without receiving evidence. The judgment of the district court is reversed and the cause remanded for further proceedings.

Supreme Court U.S.
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IN THE

Supreme Court of the United States

No. 71-5685

DAISY JOHNSON, ET AL., PETITIONERS,

—v.—

NEW YORK STATE EDUCATION DEPARTMENT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Introduction

This brief is submitted in opposition to the petition for certiorari and, for the reasons herein set forth, it is urged that the Court decline to review the decision of the Court of Appeals for the Second Circuit.

(Parenthetical numeral references are to the Appendix herein.)

Preliminary Statement

In this action commenced by three parents on behalf of their minor children who attend the schools operated by the Board of Education, Union Free School District No. 27, Town of Hempstead, Nassau County, New York, commonly known as the West Hempstead Public Schools, plaintiffs seek to review the decision of the Court of Appeals for the Second Circuit, in affirming the order of the District Court, which denied the convening of a three judge court and dismissed the complaint.

The thrust of the complaint is to declare Sec. 701 of the New York State Education Law in violation of the equal protection clause of the 14th Amendment to the Constitution of the United States. This section in substance, authorizes a board of education to loan textbooks without charge to children enrolled in grades seven to twelve. No similar provision exists for children enrolled in grades one to six. Sec. 703 of the New York State Education Law authorizes the free distribution of textbooks to pupils in grades one through six only upon the voting of a tax therefor by the qualified voters of the school district.

The West Hempstead school district voters have rejected proposed budgets for the school years 1970-1971 and 1971-1972. The West Hempstead Board of Education thereupon, in accordance with Sec. 2023 of the New York State Education Law, levied a tax in the absence of voter approval for the sums estimated necessary for teachers' salaries and for ordinary contingent expenses. Ordinary contingent expenses are those mandated by statute or deemed absolutely necesasry in order to operate and maintain the schools. Excluded are those expenses which by law, only the voters can authorize.

The thesis of the attack upon the constitutionality of Sec. 701 of the Education Law is that the classification of free textbooks is arbitrary, without any compelling state interest, and without a rational relationship to any state end; that the requirement continued in Sec. 703 of the Education Law for voter approval is discriminatory; and that Sec. 701 of the Education Law is a denial of equal educational opportunity.

The defendant Board of Education believes that textbooks for all pupils are essential to a quality educational program and a necessary and basic tool in the education of youngsters. This action is opposed principally because we believe that the remedy lies with the New York State Legislature and not with this Court.

ARGUMENT

It is clear that Sec. 701 of the Education Law is inextricably related to the annual apportionment of public monies to local school districts by the State of New York and to the operating budget of the State of New York. Sec. 701(7) of the Education Law provides that apportionment shall be paid at such times as may be determined by the commissioner of education and approved by the director of the budget.

As was observed by the District Court, (A41) prior to 1965, Sec. 701 made no provision for free textbooks and it was left to the voters in school districts to levy a tax in order to furnish textbooks in grades one to twelve. The legislative choice to allocate state funds for textbooks in grades seven to twelve resulted in giving aid where the need was greatest and where it would do the most good (A44). This is apparent from the declaration of legislative policy, which among other things, proclaims that an insufficient proportion of our population is educated in the fields of science, mathematics and foreign languages.

We believe that Sec. 701 of the Education Law should be *amended* so as to provide for the loan of textbooks free to all children attending our schools. This, however, is part and parcel of the desperate need of all school districts for additional state funds in all areas of educational concern in order to serve the needs of students in a dynamically changing society. But this is a matter for the New York State Legislature and not the Courts. As was noted by the District Court (A47) in quoting *McInnis* v. *Shapiro*, 293 F. Supp. 327, aff'd. 394 U.S. 322, (1969) "(the) allocation of public revenues is a basic policy decision more appropriately handled by a legislature than a court."

In analyzing the judgment of the State Legislature, the Circuit Court below (A15, 16) observed:

> "Thus, clearly the law is a valid means by which New York leaves some control over the school budgets to the voters of the affected school districts."

The Circuit Court below also concluded (A12):

> "Our function is not to enact laws for the State of New York or to tell the Legislature how better they could have legislated. We are restricted to making an examination of the law as actually enacted and to declaring whether there is a reasonable basis for this classification."

CONCLUSION

There is no basis for certiorari and the Court should decline to review the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

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No. 71-5685

DAISY JOHNSON, ET AL., PETITIONERS,

v.

NEW YORK STATE EDUCATION DEPARTMENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND EDUCATION HARVARD UNIVERSITY, AND THE UNITED MINISTRIES IN PUBLIC EDUCATION, IN SUPPORT OF THE PETITIONERS

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Advisory Commission on Intergovernmental Relations, State and Local Finances, Tables 8 and 12 (1969) .. 24
Bloom, Davis and Hess, *Compensatory Education for Cultural Deprivation* (Holt, Rinehart and Winston, Inc., 1967) 46, 47
Bloom, *Stability and Change in Human Characteristics* (John Wiley and Sons, Inc., 1964) 46
45 C.F.R. Part 116
Sec. 116.17(d) 45
Sec. 116.1(i) 45

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Chief Justice Warren Burger, Address to the National Conference on Corrections, Dec. 7, 1971 33

Coons, Clune and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal. L. Rev. 305 (1969) 21, 22, 33, 36

Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: Non-Constitutional Analysis*, 117 U. Pa. L. Rev. 373 (1969) 24

Hunt, *The Challenge of Incompetence and Poverty, Papers on the Role of Early Education*, (University of Illinois Press, 1969) 46

Kirp, *The Poor, the Schools, and Equal Protection*, 38 Harv. Ed. Rev. 635 (1968) 21

Michelman, *The Supreme Court, 1968 Term, Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969) .. 21, 27

Miller, Herman P., Bureau of the Census, *Income Distribution in the United States*, (U.S. Government Printing Office, 1966) 22

2A *Moore's Federal Practice* Sec. 1208 (2d ed., 1968) .. 15

President Nixon, Education Reform Message to Congress, March 3, 1970, in Weekly Compilation of Presidential Documents, March 9, 1970 23

N.Y. State Education Dept., Center on Information in Education, Basic Educational Data System Statistics, (1969-70) 43

N.Y. State Education Dept., *French for Elementary Schools*, (Albany, 1966) 43

N.Y. State Education Dept., *Spanish for Elementary Schools*, (Albany, 1970) 43

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President Nixon, Statement by the President on Elementary and Secondary School Desegregation, March 24, 1970 ..... 10, 23
President Nixon, Statement (on School Desegregation), Feb. 16, 1970 23
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The Handbook of Private Schools, 52nd. Edition, (Porter Sargent, 1971) 42

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5685

DAISY JOHNSON, ET AL., PETITIONERS,

v.

NEW YORK STATE EDUCATION DEPARTMENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND EDUCATION HARVARD UNIVERSITY, AND THE UNITED MINISTRIES IN PUBLIC EDUCATION, IN SUPPORT OF THE PETITIONERS

Introduction — Interest of the Amici

We present this brief, supporting the petitioners, with the consent of all parties pursuant to Supreme Court Rule 42(2). Copies of the three letters of consent are attached to our covering letter to the Clerk of this Court.

The *Amici* are the Center for Law and Education, Harvard University, and the United Ministries in Public Education. The Center was formed in 1969. Sponsored by the Harvard Law School and the Harvard Graduate School of Education, the Center is funded by the United States Office of Economic Opportunity to work with local legal service offices and other attorneys on behalf of the poor, to promote reform in education. Center attorneys have worked on problems in the following areas: school fees (about which we have received numerous inquiries); student rights; resource allocation, within and between school district; "ability grouping" practices; racial discrimination; and federal programs, particularly Title I of the Elementary and Secondary Education Act of 1965. The Center publishes a bulletin, *Inequality in Education.*

Center personnel have participated in significant litigation; done research and writing; drafted legislation; and negotiated with public officials. The court of appeals entered orders in this case accepting a brief and a reply brief, *amicus curiae,* filed by the Center. The court's opinion referred to these briefs.[1] In this Court, the *Amici* filed a brief in support of the petition in November, 1971. This Court accepted an *amicus curiae* brief prepared by Center attorneys in the cases involving aid to parochial schools during the October, 1970 Term. See *Lemon* v. *Kurtzman,* 401 U.S. 931.

The Center's affiliation with the Harvard Graduate School of Education facilitates our presenting to courts educational data which is material under governing legal principles. In this brief, we present such data bearing upon the "interests of those who are disadvantaged by the [challenged] classification." *Kramer* v. *Union Free School*

[1] "In addition to the briefs of the parties, this court has the advantage of a well-prepared brief and reply brief submitted by the Center for Law and Education of Harvard University." (App. at 63.)

District, 395 U.S. 621, 626, quoting *Williams* v. *Rhodes,* 393 U.S. 23, 30 (explanation added).

The United Ministries in Public Education (UMPE) was created by a group of agencies of the Episcopal Church, Presbyterian Church of the United States, the United Church of Christ, and the United Presbyterian Church, U.S.A., to serve as a joint agency of these religious communions. Its purpose is to assert that the Church is a vital force in our society and as such must accept its accountability for education. The UMPE supports the public educational system where it is contributing to the humane development of persons and calls for reevaluation of the system where needed. The UMPE works in coalition with others for the reform of educational policy and practice where necessary.

The UMPE's goals cover a wide spectrum of concerns for equalized educational opportunity. The UMPE supports litigation seeking to equalize educational opportunity by challenging special tax measures and tax allocation formulas for public education which perpetuate inequality of opportunity.

Statement

Procedural History

Parents of elementary school students in Union Free School District No. 27, Town of Hempstead, New York, began this class action on September 16, 1970, challenging the denial of textbooks to their children as violative of the equal protection clause of the Fourteenth Amendment.[2] Plaintiffs presented three claims, focusing on the denial of texts to their children because of plaintiffs' inability

[2] The defendants are the superintendent and school board of District 27, the New York State Education Department and the Department's commissioner. (App. at 10.)

to pay the rental fee (Claim III), and the differences in the procedures for providing texts for students in grades 7-12 and 1-6 under Sections 701 and 703, respectively, of New York's Education Law (Claims II and III). (App. at 10-12.)

Plaintiffs prayed, in part for:

— an order "enjoining the defendants ... from enforcing or implementing New York Education Law Sec. 701 insofar as it denies free textbooks to those pupils in first through sixth grades, while requiring free textbooks for pupils in grades seven to twelve...."
— a "declaratory judgment declaring New York Education Law Sec. 701, *et seq.* unconstitutional ...."
— and "such additional or alternative relief as the Court may deem to be just and appropriate." (App. at 13-14.)

The district court dismissed the complaint for failure to state a claim, without holding an evidentiary hearing or requesting that a three-judge court be convened. See 319 F. Supp. 271. The court of appeals affirmed, Judge Kaufman dissenting. See 449 F. 2d 871.

On February 22, 1972, this Court granted plaintiffs' petition for a writ of certiorari. See 92 S. Ct. 986. Plaintiffs' petition raised only the third or poverty claim, presenting two questions:

(1) May New York State constitutionally deny indigent children textbooks essential for required instruction solely because of their inability to pay rental fees?
(2) Have petitioners raised a substantial constitutional claim requiring that a three-judge court be convened?

Facts

The answer of the defendant local school officials, the superintendent and school board of District 27, forthrightly admits that the denial of textbooks to poor children in grades 1 to 6 creates two classes of students in those grades, and contravenes the equal protection clause of the Fourteenth Amendment.

> 12. Admit that the denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks. (App. at 35.)

This admission is fully supported by the other facts of record, briefly summarized as follows:

1. New York's compulsory attendance law requires children between the ages of 6 and 16 to attend school. N.Y. Education Law, Sec. 3205(1)(a).

2. In 1970-71 (and again in 1971-72 as shown by the Petition), the system required payment of a $7.50 rental fee for textbooks for all students in grades 1 to 6, regardless of the economic status of their families. (Admitted; App. at 7, 34.)[3]

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[3] The overall textbook distribution scheme, as of the filing of the action, was as follows: (1) Section 701 of the New York Education Law required districts to lend textbooks free to all students in grades 7-12 attending public and private schools, and provided for a state grant to cover the cost. (2) Section 703 of the New York Education Law required districts to lend textbooks free to students in grades 1-6, *if the voters approved a tax for these books.* (3) When, as in this school district in 1970-71 and 1971-72, the voters did not approve this tax for texts for grades 1 to 6 and other purposes, the district could still levy a tax for "teachers' salaries" and "ordinary contingent expenses." New York Education Law, Sec. 2023. (4) Opinion Number 213 of the Counsel to the Education Department, July 6, 1967, did not include expenditures for texts for grades 1-6 as

3. The named plaintiffs had a total of five children enrolled in grades 1-3 in the system. (App. at 22, 24, 26.)

4. The complaint alleged that "[p]laintiffs, recipients of public assistance, are indigent and cannot pay [the] fee." (App. at 4, 8-9.) While the local defendants generally denied this allegation (App. at 34), the named plaintiffs made uncontroverted affidavits, filed in the district court, that they were unable to pay the fee. (App. at 22, 24, 27.)[4]

5. "Children who did not bring the fees demanded were denied textbooks ...." (Admitted; App. at 7, 34.)

6. The complaint alleges that the operative effect of the fee requirement is to create two classes of students in grades 1-6. "[Plaintiffs'] children are ... being denied essential textbooks,[5] which are nonetheless available to other similarly situated but more wealthy children, and hence receive a significantly inferior education solely because of plaintiffs' indigency." (App. at 4.) The allegation of an

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being in the category of "ordinary contingent expenses." (5) The district provided texts free to grades 7-12, but charged a fee for grades 1-6. (See App. at 59-60.)

On June 22, 1971, the legislature added the following sentence to Section 703. "Notwithstanding the provisions of subdivision one of this section, where the qualified voters have failed, neglected or refused to authorize free distribution of textbooks, the board of education or trustees of the district may, within its discretion, purchase textbooks and either rent or sell the same to pupils in grades one through six, inclusive, attending the schools in such district." N.Y. Laws of 1971, Ch. 699.

[4] As set forth in the complaint, in addition to the textbook fee, the system charged fees, varying in amount based upon grade level, for workbooks, duplicating paper and other supplies and materials. (App. at 7, 83.) Under this schedule, the named plaintiffs were assessed the following amounts. Daisy Johnson (4 children) — $58.50; Dorothy Miller (1 child) — $6.00; and Forestine Pressy (1 child) — $17.50. (App. at 9, 83.) Also, plaintiffs made affidavits that they lived more than a mile from the schools to which their children were assigned and that the system informed them that it would no longer provide free bus transportation. (App. at 22, 24, 26.)

[5] In his dissenting opinion in *Board of Education* v. *Allen*, 392 U.S. 236, 252, Mr. Justice Black stated: "Books are the most essential tool of education, since they contain the resources of knowledge which the educational process is designed to exploit."

"inferior education" is established by the record. In addition to the admission by the local defendants in paragraph 12 of the answer quoted above, their papers filed in the courts below and this Court contain the following statements:

> We believe ... that textbooks for all pupils are essential to a quality educational program and a necessary and fundamentally basic tool in the education of youngsters.
>
> Affidavit of School Board President Donald J. Siskind, September 23, 1970. (App. at 40.)
>
> The denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks.
>
> Affidavit of Superintendent Edward Moyer, September 25, 1970. (App. at 41.)
>
> The defendant Board of Education believes that textbooks for all pupils are essential to a quality educational program and a necessary tool in the education of youngsters.
>
> Brief of local defendants in Court of Appeals at 3.
>
> The defendant Board of Education believes that textbooks for all pupils are essential to a quality educational program and a necessary tool in the education of youngsters.
>
> Brief in Opposition of local defendants in this Court at 3.

In the district court, the plaintiffs presented the affidavit of Dr. Gerald G. Glass, Professor of Education and Director of the Reading and Study Center and Graduate Pro-

gram in Reading at Adelphi University. It reads, in part, as follows:

> No educational program can exist without books. It is professionally unthinkable to assume that an educational program of even the meagerest scope would not minimally include books. Books of all kinds, readers, workbooks, trade books, reference books, et al. The process of education, as conceived in this country, assumes that persons must 'learn' not only from their own relatively narrow, actual experiences, but also from the extensive dimension that can only be offered through books. (App. at 31-32.)
>
> In fact, in my opinion a good case could be made for the grade school as having more pertinent requirements for textbooks. Because the early school years are the formative school years a wealth of material needs to be applied to offer the youngsters reinforcement for learning. It is not uncommon that a textbook in the primary grades serves as the major structure for the whole curriculum in any one subject. (App. at 33.)

7. The complaint alleged, in part, (App. at 13):

> (XII) (b) Indigent children sitting, bookless, side by side in the same classroom with other more wealthy children learning with purchased textbooks engenders a widespread feeling of inferiority and unfitness in poor children and is psychologically, emotionally and educationally disastrous to their well being.

While affirming the district court's dismissal of the action, the court of appeals majority described this allegation as

"quite [realistic]," a position with which Judge Kaufman dissenting agreed. (App. at 62, 79.)

Plaintiffs' affidavits portray clearly the tragic impact of the denial of texts:

> On the first day of school my daughter asked her teacher for textbooks and was told that she would have to bring money from her mother to obtain textbooks. My daughter asked me upon her return from school why some children in her class were given books, and I told her, that the parents of those children were able to pay for the textbooks.
>
> Affidavit of Plaintiff Forestine Pressy. (App. at 26.)
>
> ... (a) Herron Johnson, age 8, attends the third grade. Each day he is told that he will receive an 'F' for the day because he is without the required textbooks. When the other pupils in the class read from textbooks, the teacher doesn't let him share a book with another pupil, instead she gives him paper and tells him to draw.
>
> Affidavit of Plaintiffs' counsel Carl Nathanson. (App. at 28.)

8. In summary, this case involves a shocking situation: poor children are required to attend school without an "essential" educational tool, for reasons wholly beyond their own control; as a direct consequence, they are denied an educational opportunity equal to children from more affluent families, and stigmatized; and all this occurs in a nation whose constitution guarantees the equal protection of the laws and whose President proclaims:

> Economic, educational, social mobility—all these too, are essential elements of the open society. When we

> speak of equal opportunity we mean just that; that each person should have *an equal chance at the starting line,* and an equal chance to go just as high and as far as his talents and energies will take him.
>
> Statement by the President [Nixon] on Elementary and Secondary School Desegregation, March 24, 1970, at 17. (Emphasis added.)

Summary of Argument

1. The textbook fee operates to create two classes of students in grades 1-6. Students whose parents can pay the rental fee receive essential texts and can participate fully in the educational program. Other students, denied texts *because of their parents' poverty,* are admittedly deprived of an equal educational opportunity. Moreover, poor children suffer this fate in the schools which New York requires them to attend.

During the past 17 years, in a series of approximately 19 cases, this Court has held a variety of fee and payment requirements, with a similar wealth-impact, violative of the Fourteenth Amendment. These cases, in which the Court scrutinized carefully the particular interest burdened, involved the criminal process (*e.g., Griffin* v. *Illinois,* 351 U.S. 12), voting (*Harper* v. *Virginia State Board of Elections,* 383 U.S. 663) and divorce litigation (*Boddie* v. *Connecticut,* 401 U.S. 371.)

The pronouncements of this and other courts, and our Presidents, the objective treatment of education by Congress and the states, and the importance of education to the individual and society—demonstrate that its significance parallels that of the interests involved in the previous wealth-impact cases. We show, herein, that the principles employed in those cases require a holding that defendants' conduct violates the Fourteenth Amendment. Our conten-

tion is buttressed by the stigmatization which must necessarily occur when children of poor families are required to sit bookless in the classroom. See *Wisconsin* v. *Constantineau*, 401 U.S. 433. (See discussion at 16-24.)

2. Defendants' conduct is "not rationally based and free from invidious discrimination." *Dandridge* v. *Williams*, 397 U.S. 471, 487. All children, rich and poor, arrive at the schoolhouse door similarly situated in terms of their own conduct. Further, it is the students', not the parents' constitutional rights which are at issue (*Tinker* v. *Des Moines Ind. Com. Sch. Dist.*, 393 U.S. 503, 511); and New York's compulsory attendance law expresses the legislature's determination, where education is concerned, not to rely upon parental action. Given these factors, treating children, otherwise similarly situated, differently because of their *parents'* poverty is not "rationality," but an "arbitrary . . . choice." *Reed* v. *Reed*, 404 U.S. 71, 76-77.

Moreover, denying children books is unrelated to the local system's objective of raising funds; their parents are too poor to pay. And, the denial of books is affirmatively destructive of the goal of educating all children manifested by Article XI, Section 1 of New York's Constitution and the compulsory attendance law, Section 3205 (1) (a). "[T]he State spites its own articulated goals ...." *Stanley* v. *Illinois*, 40 U.S. Law Wk. 4371, 4373.

The "invidious discrimination" is clear. Poor children will be stigmatized. The personal right of a child is burdened because of his parents' poverty, wholly beyond his control. See *Levy* v. *Louisiana*, 391 U.S. 68, 72. The fee has a wealth-impact. Finally, it is material that New York law demonstrates that there are less onerous alternatives. *Carrington* v. *Rash*, 380 U.S. 89, 95-96. (See discussion at 24-29.)

3. The material facts are indistinguishable from those in *Griffin* v. *Illinois*, 351 U.S. 12, *Douglas* v. *California*, 372 U.S. 353 and their progeny. In each situation: (1) the individual's predicament arises from state coercion (prosecution and the compulsory attendance law); (2) something unavailable to the poor is an essential tool for enjoyment of a right; and (3) the tool is fully available to persons who can pay the fee in advance. We show that this case is not distinguishable because it involves education rather than the criminal process. (See discussion at 29-38.)

4. Defendants' conduct violates the Fourteenth Amendment, even if consideration is given to the asserted bases for distinguishing, in the statutory scheme, grades 1-6 and 7-12. First, there are "less drastic" alternatives (*Dunn* v. *Blumstein*, 40 U.S. Law Wk. 4269, 4276) for satisfying state interests. Second, analysis of the legislation reveals a scatter-shot approach, insufficiently tailored to achieving the purported interests to justify the denial of an essential educational tool to the poor. *Kramer* v. *Union Free School District*, 395 U.S. 621, 633. Third, both in terms of the purported state objectives, and independently, those disadvantaged by the classification have, at a minimum, "a stake equal to that of other [pupils]." *Evans* v. *Cornman*, 398 U.S. 419, 426; *Phoenix* v. *Kolodziejski*, 399 U.S. 209-212. Fourth, the court below approved a scheme whereby resources are conserved by "invidious distinctions between classes of citizens." *Graham* v. *Richardson*, 403 U.S. 365, 374-375. (See discussion at 38-49.)

5. We show also that the classification does not satisfy the standard of *Dandridge* v. *Williams*, 397 U.S. 471, 487, even if the asserted bases for distinguishing grades 1-6 and 7-12 are considered, and that defendants deny due process

of law by arbitrarily infringing the interest of poor children in an education [*Meyer* v. *Nebraska,* 262 U.S. 390; *Williams* v. *Illinois,* 399 U.S. 235, 259-266 (concurring opinion of Harlan, J.)], and stigmatizing them. *Wisconsin* v. *Constantineau,* 400 U.S. 433. (See discussion at 49-53.)

6. Plaintiffs sought *only declaratory relief* on their third or poverty claim, the only claim which they argue in this Court. This claim for declaratory relief does not require the convening of a three-judge court. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144; see also *Rockefeller* v. *Catholic Medical Center,* 397 U.S. 820, vacating per curiam, 305 F. Supp. 1256, 305 F. Supp. 1268 (E.D. N.Y., 1969). The dismissal of the poverty claim, without any evidentiary hearing, was erroneous. *Conley* v. *Gibson,* 355 U.S. 41, 45-46. Moreover, the record is adequate, and this Court's authority broad enough (*Boddie* v. *Connecticut,* 401 U.S. 371), for the Court to declare that children whose parents are unable to pay the rental fee have a right to free books. In addition, the district court should be required to identify, expeditiously, the class of students entitled to free texts. (See discussion at 13-16, 53-55.)

Argument

I. The Procedural Posture.

The procedural posture of this case delineates both the issue in this Court and the scope of this Court's remedial authority. There are three pertinent factors: the failure to convene a three-judge court; *the dismissal without an evidentiary hearing;* and the fact that plaintiffs sought only declaratory relief with respect to the substantive claim which they press in this Court.

Plaintiffs' complaint presented three claims. They chal-

lenged: (1) the differences in the circumstances in which texts are provided free to grades 7-12 and 1-6 under Sections 701 and 703, respectively (Claim I); (2) the application of the procedural burden of voter approval only to grades 1-6 under Section 703 (Claim II); and (3) the denial of books to children because of their parents' poverty (Claim III). (App. at 10-12.) Plaintiffs sought injunctive relief as to Claim I and apparently Claim II. (App. at 13.) As to the third or poverty claim, however, plaintiffs sought only declaratory relief.[6]

The lower courts held all three claims insubstantial. In this Court, plaintiffs advance only the third, or poverty claim on which they sought declaratory relief. Thus, plaintiffs do not challenge the insubstantiality findings on Claims I and II, and argue a claim for declaratory relief which would not require the convening of a three-judge court. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 152-155; see also *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820 (per curiam);[7] *Mitchell* v. *Donovan*, 398 U.S. 427; *Perez*

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[6] App. at 13; compare numbered paragraphs 2 and 3 of the prayer for relief. See also App. at 3, 15, 17 and 21. In one isolated instance, plaintiffs did refer to an injunction against the operation of "Sec. 701, *et seq.* . . ." (App. at 5.)

[7] In *Catholic Medical Center*, plaintiff-hospitals challenged in a class action, on federal statutory and constitutional grounds, a New York law freezing the rate of state reimbursement for Medicaid services irrespective of the actual reasonable cost to the hospitals. The hospitals sought injunctive and declaratory relief apparently involving millions of dollars. Viewing the statute as inconsistent with federal law, the three-judge court nevertheless granted only declaratory relief, in part because the "state ha[d] shown a desire to comply . . . ." See *Catholic Med. Center* v. *Rockefeller*, 305 F. Supp. 1256; 305 F. Supp. 1268 (E.D.N.Y. 1969). In dismissing the state's appeal of the declaratory relief, this court held that it did not have jurisdiction on direct appeal because the "judgment appealed does not include an order granting or denying an interlocutory or permanent injunction . . . ." See 397 U.S. 820.

We note that in *Catholic Medical Center* this Court construed 28 U.S.C. 1253, whereas our argument concerns the meaning of 28 U.S.C. 2281. However, in each instance the critical factor is the meaning of

Ledesma, 401 U.S. 82, 128-129 at n.18 (concurring opinon). Accordingly, in reviewing the dismissal of the complaint, this Court's remedial authority is considerably roader than if the issue were limited to the correctness f the failure to convene a three-judge court. Compare *chneider* v. *Rusk*, 372 U.S. 224 (per curiam) with *Boddie* *Connecticut*, 401 U.S. 371.[8] We discuss our views on ie appropriate relief in greater detail in the Conclusion. Although plaintiffs' poverty claim does not require the onvening of a three-judge court, the dismissal was eroneous unless it appears "beyond doubt that the plainff[s] can prove no set of facts in support of [their] claim hich would entitle them to relief." *Conley* v. *Gibson*, 355 .S. 41, 45-46; 2A Moore's Federal Practice, Sec. 12.08, at 271-74 (2d ed., 1968), quoted in *Williams* v. *Page*, No. 3536 (C.A. 7, June 9, 1971) (unreported), *cert. denied*, 404 .S. 1005, *reversing*, 309 F. Supp. 814 (N.D. Ill., 1970). iven this standard, we maintain that in view of the pertient substantive case law, the admissions of the local deendants and the allegations of plaintiffs' complaint and ffidavits which must, on motion to dismiss, be accepted as

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e words "an interlocutory or permanent injunction." Further, the ourt's construction of the same words in 28 U.S.C. 2282 in *Menza-Martinez* supports our position.

[8] In *Schneider*, the court of appeals affirmed the district court's nclusion that the complaint presented no substantial constitutional sue, and the consequent refusal to convene a three-judge court. This ourt reversed, finding the constitutional question "not plainly inbstantial" in view of "intervening decisions," the opinion also notg, in part: "No view is here intimated as to the merits of the conitutional question . . . ." 372 U.S. at 225. In *Boddie*, the three-judge urt dismissed, without an evidentiary hearing, plaintiffs' Fourenth Amendment challenge to the filing fee requirement for comencing divorce litigation, as applied to indigent persons. See 286 Supp. at 972. (D. Conn., 1969). On appeal, this Court found e factual record adequate, and, implicitly, its authority broad enough hold the fee requirement, as applied to poor persons, violative of the ue process clause.

true,[9] the lower courts erred in dismissing the complaint.[10]

II. The Defendants Have Denied Children From Poor Families The Equal Protection Of The Laws In Violation Of The Fourteenth Amendment.

A. *Introduction: The Fee And Payment Cases And The Importance Of Educational Opportunity.*

1. *The fee and payment cases.*

The local defendants admit that the *impact* of their fee requirement is to deny to poor children an educational opportunity equal to children from more affluent families. We note, therefore, at the outset, that this Court has in five cases held "fees" having a similar, discriminatory *impact*, based upon wealth, violative of the Fourteenth Amendment. See *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, 365 U.S. 708; *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663; *Boddie* v. *Connecticut*, 401 U.S. 371; *Bullock* v. *Carter*, 92 S. Ct. 849.

Burns and *Smith* involved, respectively, $20 and $4 fees to invoke appellate jurisdiction to review a criminal conviction and the denial of a habeas corpus petition. In each case, the fee operated to prevent an indigent defendant from using the remedy fully available to more affluent per-

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[9] *Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 172; *Cooper* v. *Pate*, 378 U.S. 546.

[10] Finally, the court below suggested that it might be necessary for plaintiffs to amend the complaint "to attack the constitutionality of the voters' action." (App. at 71, n.8.) However, plaintiffs did allege the voters' action and challenge the statutory scheme as denying Fourteenth Amendment rights to indigent students. (App. at 7, 12.) This surely was adequate. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 46.

ons.[11] In *Harper,* the Court held that Virginia's $1.50 oll tax contravened the Fourteenth Amendment. During he 1971 Term, in *Bullock,* the Court ruled that certain 'exas filing fee requirements for primary elections were iolative of the equal protection clause. The Court noted hat the filing fee had a "real and appreciable *impact*" on oting, stressing that "this *impact* [was] related to the esources of voters supporting a particular candidate...." 2 S. Ct. at 856; emphasis added. Finally, in *Boddie,* the 'ourt ruled that as applied to indigent persons Connec-icut's fee requirement for commencing divorce litigation enied due process of law.

Furthermore, in a number of cases, the Court has found 'ourteenth Amendment violations where some other pay-ient requirement operated to deny to the poor the benefit f a right fully available to more affluent persons. These ases began with *Griffin* v. *Illinois,* 351 U.S. 12 (1956) in 'hich adequate appellate review was unavailable to in-igent defendants because they could not afford a tran-cript and the state did not provide one free in the cir-umstances of their case.

Griffin has been followed in approximately 13 cases in he criminal process area, involving transcripts and other egal instruments,[12] requirements to invoke appellate juris-

[11] "While $4 is, as the State says, an 'extremely nominal' sum, one does not have it and is unable to get it the fee might as ell be $400—which the State emphasizes it is not." *Smith* v. *Ben-ett,* 365 U.S. 708, 712.

[12] *Eskridge* v. *Washington State Bd.,* 357 U.S. 214 (free tran-cript for appeal only if trial judge concludes justice promoted); *raper* v. *State of Washington,* 372 U.S. 487 (free transcript for ppeal only if trial judge makes certain findings); *Long* v. *District ourt,* 385 U.S. 192 (no provision for free transcript for indigent's ppeal from denial of habeas corpus petition); *Roberts* v. *LaVallee,* 89 U.S. 40 (no provision for free transcript for indigent-ac-used of testimony of witnesses at preliminary hearing); *Gardner* . *California,* 393 U.S. 367 (no provision for free transcript of hear-ng denying habeas corpus petition, where a *de novo* hearing on peti-on in appellate court).

diction,[13] counsel for indigent defendants on appeal[14] and the conversion of a fine assessed an indigent defendant to time served.[15] During the 1971 Term, the Court applied the *Griffin* rule in a non-felony case, *Mayer* v. *Chicago*, 404 U.S. 189, noting the "invidiousness" of a rule having an impact along lines of wealth. 404 U.S. at 196-197.[16]

In sum, in the fee and payment cases, this Court held that procedures which had an *impact* along lines of wealth "introduce[d] capricious or irrelevant factor[s]." *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 668.[17]

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[13] *Lane* v. *Brown*, 372 U.S. 477 (filing of transcript, available to indigent only on request of public defender, necessary for appellate jurisdiction to review denial of *coram nobis* petition); *Williams* v. *Oklahoma City*, 395 U.S. 468 (filing of "case made" in appellate court necessary to invoke jurisdiction to review criminal conviction).

[14] *Douglas* v. *California*, 372 U.S. 353; *Swenson* v. *Bosler*, 386 U.S. 258; *Anders* v. *California*, 386 U.S. 738.

[15] *Williams* v. *Illinois*, 399 U.S. 235, *Tate* v. *Short*, 401 U.S. 395. In these two cases, "[a]pplying the teaching of the *Griffin* case," the Court held "that an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense." *Williams* v. *Illinois*, 399 U.S. 235, 241.

[16] See also *Lindsey* v. *Normet*, 92 S. Ct. 862; *Townsend* v. *Swank*, 404 U.S. 282. The Court held in *Lindsey* that Oregon's double bond requirement for appealing certain landlord-tenant actions contravened the equal protection clause. The opinion stated, in part: "The discrimination against the poor . . . is particularly obvious." 92 S. Ct. at 877. In *Townsend*, the Court stated: "[A] classification which channels one class of people, poor people, into a particular class of low paying, low status jobs would plainly raise substantial questions under the Equal Protection Clause." 404 U.S. at 292, n. 8. (Dictum.)

[17] The Court's decision in *James* v. *Valtierra*, 402 U.S. 137 is consistent with the wealth-impact cases. The lower court in *Valtierra* held that Article XXXIV of the California Constitution violated the equal protection clause of the Fourteenth Amendment, focusing on the fact that *on its face* Article XXXIV "applie[d] only to 'low income persons'. . . ." 313 F. Supp. at 4. In reversing, this Court viewed plaintiffs' challenge as directed *to the face* of the provision: "[A]ppellees contend that Article XXXIV denies them equal protection because it demands a mandatory referendum while many other referendums only take place upon citizen initiative." 402 U.S. at 141-142.

In contrast, the admitted *impact* of the statutory scheme here is to apportion educational opportunity along lines of wealth. *Valtierra*

The Court used several analyses in deciding these cases. We show in this brief that the textbook fee denies Fourteenth Amendment rights under each approach. We demonstrate also that application of the standard articulated in *Dandridge* v. *Williams,* 397 U.S. 471, 487—"rationally based and free from invidious discrimination"—mandates the same result.

2. *The importance of educational opportunity.*

In the fee and payment cases, this Court has considered carefully the particular interest burdened. See, *e.g., Boddie* v. *Connecticut,* 401 U.S. 371, 374; *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 670; *Griffin* v. *Illinois,* 351 U.S. 12, 19. Important interests are at stake here, for books "are the most essential tool of education,"[18] and "[o]ur public educational system is the genius of our democracy." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 628 (dissenting opinion).

In 1954, this Court unanimously stressed the importance of educational opportunity in *Brown* v. *Board of Education,* 347 U.S. 483, 493.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It

suggests that this Court will treat differently facial racial classifications and facial classifications based upon wealth. To construe the case more broadly, however, is to ignore the prior wealth-impact decisions and the subsequent holdings and statements in *Mayer*, *Townsend*, *Lindsey* and *Bullock*.

[18] *Board of Education* v. *Allen*, 392 U.S. 236, 252 (dissenting opinion of Black, J.).

> is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Fourteen years after *Brown I*, this Court expressed similar views on education in *Board of Education* v. *Allen*, 392 U.S. 236, interestingly in construing the same provisions of New York State law involved in this controversy. In *Allen*, the Court upheld the requirement in Section 701 that public school systems provide texts for students enrolled in parochial schools, noting in the opinion: "Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create." 392 U.S. at 247.

During the October, 1970 Term, this Court reiterated its view on the importance of education, quoting from *Brown I* in *Palmer* v. *Thompson*, 403 U.S. 217, 221, n.6.[19]

In this case, despite ruling against plaintiffs, the court of appeals majority characterized education as "no doubt

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[19] In *Palmer*, the Court distinguished the closing of swimming pools involved in *Palmer*, and public schools in *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42 (ED. La., 1960), *affirmed per curiam*, 365 U.S. 569, stating: "Of course that case [*Bush*] did not involve swimming pools but rather public schools an enterprise we have described as 'perhaps the most important function of state and local governments.' *Brown* v. *Board of Education* . . . ." *Palmer*, *supra*, 403 U.S. at 221, n. 6; see also 403 U.S. at 229 (concurring opinion of Blackmun, J.).

an area of fundamental importance" (App. at 72), a conclusion with which Judge Kaufman dissenting agreed. (App. at 77-79.) Other lower federal courts have reached the same conclusion. In a seminal case, the Court of Appeals for the Fifth Circuit held in *Dixon* v. *Alabama*, 294 F. 2d 150 (1961), that due process required notice and hearing prior to the expulsion of a student from a public college. The court's opinion, by Judge Richard Rives, reads, in part, as follows (294 F. 2d at 157):

> It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.[20]

Commentaries have also recognized the unique significance of education.[21]

As the quotations from *Brown I* and *Dixon* reveal, education is precious not only in its own right, but also because it provides the tools necessary for exercising other important rights—voting (*Harper* v. *Virginia State Board of*

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[20] See also *Williams* v. *Dade County School Board*, 441 F. 2d 299, 302 (C.A. 5, 1971) (Per Tuttle, J.); *Hosier* v. *Evans*, 314 F. Supp. 316, 319, 320 (D. Vir. Is., 1971); *Ordway* v. *Hargraves*, 323 F. Supp. 1155, 1158 (D. Mass., 1971); *Sullivan* v. *Houston Independent School District*, 333 F. Supp. 1149, 1171-1172 (S.D. Tex., 1971); *Van Dusartz* v. *Hatfield*, 40 Law Wk. 2228 (Oct. 26, 1971), No. 3-71 Civ. 243 (D. Minn., Oct. 12, 1971); *Rodriguez* v. *San Antonio Independent School District*, 40 Law Wk. 2398 (Jan. 4, 1972), C.A. No. 68-175-SA (W.D. Tex., Dec. 23, 1971); *Serrano* v. *Priest*, 487 P. 2d 1241, 1258 (Cal. Sup. Ct., 1971).

[21] Coons, Clune and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal. L. Rev. 305, 382-389 (1969); Kirp, *The Poor, the Schools and Equal Protection*, 38 Harv. Ed. Rev. 635, 642-645 (1968); Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 28, 48 (1969).

Elections, 383 U.S. 663); speech (*Lovell* v. *Griffin*, 303 U.S. 444); association (*NAACP* v. *Alabama*, 357 U.S. 449); and travel (*Shapiro* v. *Thompson*, 394 U.S. 618). As one article notes:

> [E]ducation underlies the whole substance of the political process and is antecedent to voting in the orders of both time and cause. All political behavior inevitably must reflect the presence or absence and the quality of education. A man's understanding of public issues is a function of those communications which are intelligible to him.[22]

Similarly, the ability to write a book or magazine article, play a part in the production of a motion picture or give a speech are facilitated and enhanced by education.[23] Conversely, an inadequate education is likely to have a lingering, negative impact. "Unequal education ... leads to unequal job opportunities, disparate income,[24] and handi-

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[22] Coons, Clune and Sugarman, *supra* n. 21, at 368.

[23] See, *e.g.*, *A Book, Etc.* v. *Attorney General of Com. of Mass.*, 383 U.S. 413 (book); *Jacobellis* v. *Ohio*, 378 U.S. 184 (motion picture); *Terminiello* v. *Chicago*, 337 U.S. 1 (speech).

[24] A comprehensive Bureau of the Census analysis demonstrates the correctness of the court's observation on "disparate income."

> In every year for which data are presented, additional schooling is associated with a very substantial increase in lifetime income. On the basis of conditions in 1961, a man with less than 8 years of schooling could expect to earn about $151,000 in a lifetime. Graduation from elementary school would add $54,000 to his expected earnings. Similarly, a man with 1 to 3 years of high school could expect to earn $235,000 over a lifetime, compared with a total of $273,000 for the high school graduate. Financial returns prove greatest, as might be expected, at the college level. The man with some college training, but without a degree, could expect to earn about one-third of a million dollars in a lifetime, whereas the total for the college graduate was nearly half a million.

Miller, Herman P., Bureau of the Census, *Income Distribution in the United States*, (U.S. Government Printing Office, 1966), Chapter VI, "Income and Education," at 162-163.

apped ability to participate in the social, cultural, and olitical activity of our society." *San Francisco Unified chool District* v. *Johnson*, 3 Cal. 3d 937, 950 (Cal. Sup. Ct., 971), *cert. denied*, 401 U.S. 1012.

The courts do not stand alone; all of the other institu-ons of government reflect similar concern for education. has, President Nixon has recognized its importance to e individual and society, terming "education ... the y that opens the door to personal progress,"[25] and stat-g: "America's public schools are our principal invest-ent in our own future. In every State the public schools e literally the guarantee of the State's life and growth d health."[26] The President has specifically noted the need r dealing with the educational problems of poor children, ke those denied textbooks here, stating: "The most glaring ortcoming in American education today continues to be e lag in essential learning skills in large numbers of ildren of poor families."[27]

Congress has enacted legislation providing funding for ducational programs.[28] Education is made compulsory

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[25] Statement by the President on Elementary and Secondary School esegregation, March 24, 1970, at 18.

[26] Statement by *President Nixon*, Feb. 16, 1970, at 1. Similarly, an Education Message to Congress on January 29, 1963, *President ennedy* stated:

> Education is the keystone in the arch of freedom and progress. Nothing has contributed more to the enlargement of this Nation's strength and opportunities than our traditional system of free, universal elementary and secondary education, coupled with widespread availability of college education." (1963 U.S. Code Cong. and Adm. News at 1450.)

e also 1968 Code at 4648-4649, Statement of *President Johnson* American Education Week. ("Education—universal, equal and xcellent—is a goal which we have cherished since our country's birth.")

[27] President Nixon, Education Reform Message to Congress, March 1970, in Weekly Compilation of Presidential Documents, March 9, 970, at 304, 308.

[28] See, *e.g.*, Elementary and Secondary Education Act of 1965, 0 U.S.C.; National Defense Education Act of 1958, Title 20 U.S.C.; d Johnson-O'Malley Act, Title 25 U.S.C.

for at least ten years by New York and all but three of the other states.[29] And, in fiscal 1968, 35 percent of New York's state and local tax dollars were spent on public schooling.[30]

B. *The Denial of Books to Poor Children in Grades 1 to 6 Is Not Rationally Based and Constitutes Invidious Discrimination.*

The local defendants' fee requirement for texts operates to create two classes of students in grades 1-6. Children whose parents can afford the fee receive "essential" textbooks. Other children, because of their parents' poverty, are denied texts, and, the local defendants admit, an educational opportunity equal to the children of the more affluent families.[31] As noted by Judge Kaufman in dissent, here there are "two classes of children, not physically separate yet unequal—the poor suffer while the rich receive the full benefits of the state's educational program." (App. at 80.) We submit this classification is not "rationally based and free from invidious discrimination" (*Dandridge* v. *Williams*, 397 U.S. 471, 487),[32] and, therefore, denies the equal protection of the laws.

1. *The classification is not "rationally based."*

At the threshold, the equal protection clause "imposes a

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[29] N.Y. Education Law, Sec. 3205 (1) (a); Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: Non-Constitutional Analysis*, 117 U. Pa. L. Rev. 373, 393-4, n. 74 (1969).

[30] Calculated from Advisory Commission on Intergovernmental Relations, State and Local Finances, Tables 8 and 12 (1969).

[31] See pp. 6-8, *supra*.

[32] See also *Lindsey* v. *Normet*, 92 S. Ct. 862, 876. ["Section 105.160, however, imposes additional requirements which in our judgment *bear no reasonable relationship to any valid state objective and which arbitrarily discriminate* against tenants appealing from adverse decisions in FED actions." (Emphasis added.)]

requirement of some rationality in the nature of the class singled out." *Rinaldi* v. *Yeager*, 384 U.S. 305, 308-309. The challenged classification does not satisfy this standard.

In terms of their own conduct, all elementary students, rich and poor, arrive at the schoolhouse door in District 27 similarly situated. The students' conduct is the proper reference point. First, it is their Fourteenth Amendment rights which are at issue.[33] Second, while children must often rely upon their parents, here the state makes school attendance compulsory. See New York Education Law, Section 3205 (1) (a). Given these factors, depriving children because of their parents poverty is an example not of "rationality," but instead an "arbitrary ... choice" by which defendants provide "dissimilar treatment for [students] who are ... similarly situated ...." *Reed* v. *Reed*, 404 U.S. 71, 76-77. Defendants "arbitrarily discriminate ...." *Lindsey* v. *Normet*, 92 S. Ct. 862, 876.

Such arbitrariness formed the basis for the ruling invalidating school fee policies on equal protection grounds in *Chandler* v. *South Bend Community School Corporation*, C.A. No. 71 S 51 (N.D. Ind., Aug. 26, 1971). The opinion states, in part:

> ... Defendant herein has totally failed to present any reason why the Plaintiff-students should incur sanctions for their parents' failure to pay school fees. The school fee collection procedure as applied to these minor-Plaintiffs, conditions *their personal* right to an education upon the vagaries of their parents' conduct,

[33] See *Tinker* v. *Des Moines Ind. Com. Sch. Dist.*, 393 U.S. 503, 511. ("Students in school as well as out of school are 'persons' under our constitution. They are possessed of fundamental rights which the state must respect ....") *Brown I*, 347 U.S. 483, 493. ("We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe it does.")

an intolerable practice.... (Mem. Op. at 6.) (Emphasis in original.)

Defendants' conduct fares no better if the objectives of the fee policy are considered. The apparent purpose of the requirement is to raise funds to secure texts for grades 1-6. Given this goal, the challenged requirement places children in "different classes on the basis of criteria wholly unrelated to the [state's] objective ...." *Reed* v. *Reed*, 404 U.S. 71, 75-76. For where parents are poor, this classification produces no greater revenue.[34]

The classification cannot be justified as "rationally based" on the ground that denying books to poor children decreases the total needed, and, therefore, enables the system to secure a sufficient number of texts with revenue from the fees paid. The fee requirement is but one small thread in the fabric of New York's education law. Denying books to children of the poor is affirmatively destructive of other, and, we submit, overriding state objectives. New York's Constitution requires the legislature to maintain a system of schools "wherein all the children of [the] state may be educated." N.Y. Const., Art. XI, Sec. 1. The state's compusory attendance law requires children between the ages of 6 and 16 to attend school. N.Y. Education Law, Sec. 3205 (1) (a). Manifestly, the deprivation at issue here is directly contrary to the concern for the education of all the state's children which Article XI, Section 1, and Section 3205 (1) (a) evince. "[T]he state spites its own articulated goals ...." *Stanley* v. *Illinois*, 40 U.S. Law Wk. 4371, 4373.

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[34] See *Tate* v. *Short*, 401 U.S. 395, 399. ("Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant can't pay because he is indigent ....")

2. *The denial of books constitutes "invidious discrimination".*

It is equally clear that the classification is invidiously discriminatory. First, the state requires poor children to attend school, where plaintiffs allege, and the lower court concedes, sitting bookless in the classroom while other have the "essential" educational tool, they are likely to be stigmatized, similarly to black students in the dual system. Compare *Brown I*, 347 U.S. at 494, and App. at 62.[35] Further, there can be no claim that the stigmatization serves any remedial purpose. Compare *Wisconsin* v. *Constantineau*, 400 U.S. 433.

Second, the independent, personal rights of children are burdened because of their parents' failure to pay fees. But "it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm [thus done to them] ...." *Levy* v. *Louisiana*, 391 U.S. 68, 72.[36]

Third, we view the stigmatization and arbitrariness as sufficient alone to establish that the state has "impose[d] a regime of invidious discrimination...." *Dandridge* v. *Williams*, 397 U.S. 471, 483. We note, also, however, that

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[35] See also pp. 8-9, *supra; Palmer* v. *Thompson*, 403 U.S. 217, 266-268 (dissenting opinion of White, J.); and Michelman, *supra* n. 21, at 20. ["An 'invidious' classification or trait is one which combines, in greater or lesser degree and in varying proportions, three qualities: (1) a general ill-suitedness to the advancement of any proper governmental objective; (2) a high degree of adaptation to uses which are oppressive in the sense of systematic and unfair devaluations, through majority rule, of the claims of certain persons to non-discriminatory sharing in the benefits and burdens of social existence; (3) *a potency to injure through an effect of stigmatizing certain persons by implying popular or official belief in their inherent inferiority or undeservingness.*" (Footnote omitted; emphasis added.)]

[36] Indeed, it would be arbitrary to deprive parents because of their own poverty. "We have come to recognize that forces not within the control of the poor contribute to their poverty." *Goldberg* v. *Kelly*, 397 U.S. 254, 265.

the wealth-impact classification constitutes "invidious discrimination," (*Douglas* v. *California*, 372 U.S. 353, 356-357; *Gardner* v. *California*, 393 U.S. 367, 370-371); and that there are alternative procedures not involving the destructiveness of the challenged scheme. Consideration of these alternatives is proper. *Carrington* v. *Rash*, 380 U.S. 89, 95-96; *Rinaldi* v. *Yeager*, 384 U.S. 305, 310.[37]

There are at least two available alternatives to the existing procedures in Sections 701 and 703. Apparently without additional expeditures, books could be provided free to children in grades 1 to 12 from indigent families. The remaining revenue from the state appropriation could then be used in a variety of ways to provide books free or at a reduced price to other groups of students (including students whose parents refused to pay although able to do so). In the past, the state has employed a similar procedure.[38] In addition, as plaintiffs pointed out below, state law could include texts for grades 1 to 6 in the category of "or-

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[37] In *Carrington*, like *Dandridge* written by Mr. Justice Stewart, the Court held violative of the equal protection clause a provision of the Texas Constitution prohibiting a person moving to Texas while a member of the armed forces from voting in any election in Texas while remaining in the armed forces. After stating the equal protection standard to be "whether the classifications drawn in a statute are reasonable in light of its purpose" (380 U.S. at 93, quoting *McLaughlin* v. *Florida*, 379 U.S. 184, 191), the opinion noted in detail alternatives available to the state to protect "the integrity of the qualification of residence . . . ." 380 U.S. at 93, 95-96. *Carrington* stresses the importance of voting (380 U.S. at 94, 96), but education—"perhaps the most important function of state and local governments"—is of parallel significance, and this case involves a wealth-impact classification. See pp. 16-24, *supra*.

[38] Section 3209 of the Education Law, repealed by Social Services Law Section 131a (Ch. 517, Laws of 1970), required welfare officials to "furnish indigent children with suitable . . . books, to enable them to attend" school. This provision was in effect as early as 1927. See N.Y. Laws of 1928, Ch. 646, Sec. 627 F. Moreover, the New York law to implement *Gideon* v. *Wainwright*, 372 U.S. 335, requires the appointment of counsel for persons "financially unable to obtain counsel . . . ." N.Y. Code of Criminal Procedure, Sec. 308.

dinary contingent expenses'' for which a local district can levy a tax even in the absence of voter approval. (See N.Y. Education Law, Sec. 2023, and *supra* at page 5, n.3.) The appropriateness of this alternative is clear since New York authorizes its city school districts to provide textbooks free to all grades without direct voter approval. See Education Law, Sections 2503(7), 2554(7).[39] Under each of these alternatives, every student would have books.

Thus, the wealth-impact classification and the availability of alternative procedures buttress our contention that New York "imposes an invidious discrimination in violation of the Fourteenth Amendment." *Carrington* v. *Rash*, 380 U.S. 89, 96.

C. *Defendants' Fee Requirement Contravenes the Fourteenth Amendment as Construed in Griffin v. Illinois*, 351 U.S. 12, *Douglas v. California*, 372 U.S. 353 *And Their Progeny.*

New York requires children to attend school. In District 27, textbooks are essential for meaningful participation in the educational experience. Any child without books faces an overwhelming situation. But it is not likely to be any child, for the fee requirement increases the risk for chil-

[39] The majority below appears to have suggested that under *James* v. *Valtierra*, 402 U.S. 137, the state's right to involve the electorate in the financing process is unlimited. (App. at 70.) However, to justify the inequity by this rationale would be to ignore the distinction between *Valtierra* and this court's wealth-impact cases which we have discussed. (See pp. 16-19, *supra*.) In *Valtierra*, the asserted discrimination was the *facial* requirement of a referendum which was not uniformly applicable. Here, in plaintiffs' poverty claim, the *impact* of the scheme on the poor is challenged, and the issue is whether a vote may validate it. But "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-737; *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La., 1961), *affirmed per curiam*, 368 U.S. 515. ("No plebiscite can legalize an unjust discrimination." 197 F. Supp. at 659.)

dren of the poor. Common sense dictates that as alleged by plaintiffs, and conceded by the Court below, children without books will be severely stigmatized. In the words of Judge Kaufman dissenting, "their disfavored treatment must extend far beyond the classroom and aggravate to an incalculable degree other disadvantages these indigent students must in our society inevitably struggle against...." (App. at 79.)

The combination of state compulsion and injury to the poor is a familiar one to this Court. In every material respect, the facts here parallel those in this Court's criminal process decisions beginning with *Griffin* v. *Illinois*, 351 U.S. 12.

1. *The Fourteenth Amendment principles established in Griffin-Douglas and their progeny.*

In *Griffin* v. *Illinois*, 351 U.S. 12, this Court held that the state's system of criminal appellate review, challenged by indigent defendants because of its failure to provide for free trial transcripts in the circumstances of their case, violated the Fourteenth Amendment by denying them the "adequate appellate review accorded to all [with] money enough to pay the costs in advance." *Griffin, supra*, 351 U.S. at 18. The state had "concede[d] that ... petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors." *Griffin, supra*, 351 U.S. at 16.

This Court decided *Griffin* on the premise that Illinois was not required by the federal constitution to afford any appellate review. "But that is not to say that a state that does grant appellate review can do so in a manner that discriminates against some convicted defendants on account of their poverty." *Griffin, supra*, 351 U.S. at 18.[40]

[40] It is clear, therefore, that the decision below cannot be supported by any right-privilege rationale. See also *Graham* v. *Richardson*, 403 U.S. 365, 374.

Emphasizing the irrationality of the wealth classification, he Court noted: "[T]he ability to pay costs in advance ears no rational relationship to a defendant's guilt or in-ocense . . . ." *Griffin, supra,* 351 U.S. at 17-18. "There can e no equal justice where the kind of trial a man gets de-ends on the amount of money he has." *Griffin, supra,* 51 U.S. at 19.

Griffin has had a steady growth, as we have noted. Two ases involved fees similar to the defendants' fee. See *Burns . Ohio,* 360 U.S. 252 and *Smith* v. *Bennett,* 365 U.S. 708, iscussed above at page 16. In *Douglas* v. *California,* 72 U.S. 353, indigent criminal defendants challenged n appellate court's failure to appoint counsel to pre-ent their appeal. The court relied upon a rule requir-ng such appointment only if it determined, after examin-ng the record, that counsel would be helpful to the defen-ant or the court. This Court, viewing the procedure as one n which "the rich man can require the court to listen to rgument of counsel before deciding on the merits, but a oor man cannot," held that "an unconstitutional line [had] een drawn between rich and poor." *Douglas, supra,* 372 .S. at 357.[41]

In short, in *Griffin-Douglas* and their progeny, including *Burns* and *Smith,* this Court found access to an important ight under state law, nominally available to all, totally or ubstantially unavailable to poor persons. The Court con-luded that the classification bore "no rational relation-hip" to a permissible state objective; and held that the Fourteenth Amendment required state officials, at least so ong as they followed the most likely course of action (con-nued prosecution), to act affirmatively to insure access or the indigent person. Thus, for example, in the transcript ases, the state must provide a free transcript, or adequate

[41] We have discussed 12 additional cases above. See pp. 17-18, *supra.*

substitute if any. *Griffin, supra,* 351 U.S. at 20; *Gardner* v. *California,* 393 U.S. 367, 370.

2. *The Fourteenth Amendment principles set forth in Griffin-Douglas and their progeny require that poor children be provided free textbooks.*

There is a striking parallel between the pivotal facts in *Griffin-Douglas* and this case. (1) In each instance, the predicament results from state compulsion; in *Griffin-Douglas* by prosecution, and here from the compulsory attendance law. (2) Here, as in *Griffin-Douglas,* something, unavailable to indigents,[42] is an essential tool for enjoyment of the right. (3) Without books, similar to an indigent without a transcript or an attorney, a student from a poor family is denied the benefit of the right "accorded to all [with] money enough to pay the costs in advance." *Griffin* v. *Illinois,* 351 U.S. 12, 18.

The equal protection clause is as clearly violated when the quality of education a child received depends upon the affluence of his parents, as where "the kind of trial a man gets depends on the amount of money he has." *Griffin, supra,* 351 U.S. at 19. Plainly, *a parent's* ability to pay costs in advance bears "no rational relationship to" *a child's* right to an education. *Griffin, supra,* 351 U.S. at 17-18.

There is no basis for construing the Fourteenth Amend-

[42] It is true that the court of appeals suggested that the "fixed allowance" plaintiffs received under New York's Welfare law "was intended to cover this as well as other contingent needs." (App. at 61-62, n. 3.) Of course the suggested intent of the law is irrelevant; whether or not the parents were able to pay the fee is a question of fact. Since this case was decided on a motion to dismiss, plaintiffs' affidavits and allegations of their inability to pay the fees must be taken as true. See, *e.g.*, *Cooper* v. *Pate,* 378 U.S. 546; *Gardner* v. *Toilet Goods Association,* 387 U.S. 167, 172.

ment differently from *Griffin-Douglas,* because this case involves education rather than crime. The text of the Amendment makes no such distinction between criminal and other matters, and this Court has not so construed it.[43] The *Griffin* opinion emphasizes the importance of fairness in the criminal process, but education is of parallel significance, as our argument at pages 19 to 24 demonstrates. Moreover, the *impact* of the challenged conduct is to classify based on wealth, similarly to *Griffin-Douglas* and the other wealth-impact cases outside the criminal process area, which we have discussed.[44]

Indeed, there are sound arguments that plaintiffs' case is stronger than *Griffin-Douglas.* First, education is our hope to make unneeded protection in the criminal process. In an address to the National Conference on Corrections on December 7, 1971, Chief Justice Burger stated:

> Here [prison education programs] perhaps our failure is the greatest. The percentage of inmates in all institutions who cannot read or write is staggering. Another, and largely overlapping category, is made up of those who have no marketable skills on which to base even a minimally successful life.
>
> The figures on literacy alone are enough to make one wish that every sentence imposed could include a provision that would grant release when the prisoner had learned to read and write, to do simple arithmetic, and then to develop some basic skill that is salable in the market place of the outside world to which he must some day return and in which he must compete. (Explanation added.)[45]

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[43] See, *e.g.*, *Boddie* v. *Connecticut*, 401 U.S. 371; *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663; *Brown* v. *Board of Education*, 347 U.S. 483.

[44] See pp. 16-19, *supra.*

[45] See also Coons, Clune and Sugarman, *supra* n. 21, at 362. ["Aside from reducing the crime rate (the inverse relation is strong), education

Second, as we have shown, in this case unlike *Griffin-Douglas,* children are deprived not because of their own actions, but instead because of their families' indigency, for these poor children, an "unalterable [trait] . . . ." *Lindsey* v. *Normet,* 92 S. Ct. 862, 874. And, the scheme will operate to stigmatize poor children, similarly to segregation based upon race in the dual system, with no basis for claiming any remedial benefit from the procedure producing the stigmatization.[46]

Our contentions based upon *Griffin-Douglas* and their progeny are buttressed by this Court's decision in *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, and by the Seventh Circuit's school fee case, *Williams* v. *Page,* No. 18536 (C.A. 7, June 9, 1971) (unreported), *cert. denied,* 404 U.S. 1005, *reversing,* 309 F. Supp. 814 (N.D. Ill., 1970). In invalidating on equal protection grounds Virginia's $1.50 poll tax in *Harper,* this Court stated: "[W]ealth or fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Harper, supra,* 383 U.S. at 670. As we have shown,[47] the importance of education parallels that of voting. We submit that similarly to *Harper,* "wealth or fee paying has . . . no relation to [an education]; the right

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also supports each and every other value of a democratic society . . . ." (footnote omitted.)] *Johnson* v. *Avery,* 393 U.S. 483, 487. ["Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." (Footnotes omitted.)]

[46] See pp. 8-9, *supra.* In his dissenting opinion, Judge Kaufman stated: "The psychological and social impact of the badge of inferiority implied by their disfavored treatment must extend far beyond the classrooms and aggravate to an incalculable degree other disadvantages these indigent students must in our society inevitably struggle against as a result of the financial straits of their parents. The enduring lesson they are thus taught in the public schools they attend without books is that wealth breeds favored treatment while disadvantage leads on to still greater handicaps." (App. at 79.)

[47] See pp. 19-24, *supra.*

to [an education] too precious, too fundamental to be so burdened or conditioned."

In *Williams* v. *Page,* elementary and high school students challenged, on Fourteenth Amendment grounds, the collection of fees as a condition for participation in graduation-related activities in public schools. The complaint alleged that as a consequence of the fee requirement the activities "[were] not available to the plaintiffs on equal terms because they [were] indigent." *Williams* v. *Page, supra,* 309 F. Supp. at 815. The district court dismissed the complaint.

The Seventh Circuit's brief order reversing the dismissal of the complaint reads, in part, as follows:

> The complaint alleges that graduation participation is an essential part of a child's education and the complaint may be construed as claiming that in the schools concerned the activities for which the fees are required have been recognized by the school administrators, teachers, parents and students as integral parts of the school experience, from which indigent children are being excluded. Until these and related factual questions are explored at an evidentiary hearing, the precise contours of the constitutional rights which plaintiffs claim were violated are not readily discernible.

Application of the *Williams* standard would require reversal here. To paraphrase the quoted language, the complaint herein alleges that "fees are required" for textbooks, "an essential part of a child's education," and as a consequence that "indigent children are being excluded."

The record in this case is clear that textbooks are an essential element of the educational process. (App. at 40-41.) Therefore, the defendants must provide them free to poor children. *Griffin* v. *Illinois, supra,* 351 U.S. at 20; *Gardner* v. *California,* 393 U.S. 367, 370. Strictly speaking,

it would appear that in *Griffin-Douglas*, and this case, Fourteenth Amendment obligations could be satisfied by ways other than furnishing free a transcript, counsel or books. Thus, the state could release an indigent defendant[48] and the curriculum could be other than textbook oriented. However, to the extent that furnishing a transcript, counsel or books is the most likely state response, the affirmative action here is precisely analogous to *Griffin-Douglas*.[49]

3. *The Court of Appeals erroneously construed Griffin-Douglas and their progeny.*

Despite the obvious parallels between *Griffin-Douglas*, their progeny, and this case, the lower courts rejected plaintiffs' poverty claim. Indeed, the district court did not even mention the poverty argument. The courts below erred in deciding the Fourteenth Amendment issues.

The Court of Appeals rejected the poverty contentions because "[t]he reasoning of [the] cases [relied upon by

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[48] "The remedy for the discrimination is simple, clear and effective —i.e., give the appellant a transcript (and a lawyer) or else let him go; . . ." Coons, Clune and Sugarman, *supra* n. 21, at 362.

[49] This Court has approved affirmative remedial action to provide equal educational opportunity. The *Brown I* opinion stated that the opportunity of an education "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown I*, 347 U.S. 483, 493. Thereafter, in *Griffin* v. *School Board of Prince Edward County, Va.*, 377 U.S. 218, 233, this Court held that the district court had the authority to direct public officials to exercise their power to raise funds adequate to operate a racially nondiscriminatory school system. And, finally, in the 1970 Term, the Court upheld unanimously the order of a district court which required state officials to provide substantial, additional student transportation. *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1. See also *United States* v. *School District 151 of Cook County, Ill.*, 301 F. Supp. 201, 232 (N.D. Ill., 1969), *affirmed as modified*, 432 F. 2d 1147 (C.A. 7, 1970), *cert. denied*, 402 U.S. 943; *Hosier* v. *Evans*, 314 F. Supp. 316, 320 (D. Vir. Is., 1970).

plaintiffs] [50] is that the State is required to provide these services and access because to do otherwise would be to deprive indigents of due process. Obviously, though, due process is not involved here." (App. at 72.) The court also argued that "such money as the School Board has to spend is being spent in such a way as to benefit all students (*i.e.*, on teachers' salaries, building maintenance and the like.) (Footnote omitted.)" (App. at 73.) Finally, while acknowledging that students whose families could afford texts would no doubt receive a better education, the court said that this was due to their own means, and not because the state provided them more. (App. at 73.)

Any surface plausibility of this reasoning does not withstand scrutiny. First, as noted by Judge Kaufman in dissent, *Griffin* "rested by its own language squarely on the equal protection guarantee, as well as on due process . . . ." (App. at 80.) See *Griffin, supra*, 351 U.S. at 13, 18.[51]

Second, it could have been argued in *Griffin-Douglas*, where appellate review was nominally available to the indigent, as the lower court did here, that "such money as the [State had] to spend [was] being spent in such a way as to benefit all [defendants]," that is, on salaries for judges and clerks, building maintenance, etc., and that to the extent that the affluent defendant had a more adequate appeal, this was a result of a private supplement. In fact, similar contentions were urged *in dissent* by Justice Harlan in both *Griffin* and *Douglas*.[52] A majority of this Court held, however, that in certain contexts the Fourteenth

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[50] The court cited: *Boddie* v. *Connecticut*, 401 U.S. 371; *Griffin* v. *Illinois*, 351 U.S. 12; *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, 365 U.S. 708; *Gideon* v. *Wainwright*, 372 U.S. 335.

[51] See also *Griffin, supra*, 351 U.S. at 34 (dissenting opinion of Harlan, J.); and *Williams* v. *Illinois*, 399 U.S. 235, 241, explaining *Griffin* as finding "a violation of the Equal Protection Clause . . . ."

[52] *Griffin, supra*, 351 U.S. at 34; *Douglas* v. *California*, 372 U.S. 353, 361-362.

Amendment requires more than simply facial neutrality (*Griffin, supra*, 351 U.S. at 17, n. 11):[53]

> Dissenting opinions here argue that the Illinois law should be upheld since by its terms it applies to rich and poor alike. But a law nondiscriminatory on its face may be grossly discriminatory in its operation.

For the reasons we have given, the same principle should apply here.

D. *The Denial of Books to Poor Children in Grades 1-6 Violates the Equal Protection Clause, Even If the Asserted Bases for Distinguishing Grades 1-6 and 7-12 Are Considered.*

Plaintiffs' poverty claim focuses on the division of students in grades 1 to 6 into two groups; *i.e.*, those who receive books, and the poor who do not receive the "essential" tool and are stigmatized.[54] Since the poverty claim concerns only grades 1-6, the justifications advanced in the courts below for the differing treatment of grades 1-6 and 7-12 in the statutory scheme are not material.[55] We submit, however, that even if the asserted bases for distinguishing grades 1-6 and 7-12 are considered, the stat-

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[53] See also *Williams* v. *Illinois*, 399 U.S. 235, 242.

[54] See pp. 6-8, 24, *supra*.

[55] The district court, although without the benefit of an evidentiary hearing, identified three state interests: (1) the legislature's "legitimate interest in conserving the State's fiscal resources . . . ." (App. at 54); (2) insuring "that as many as possible of [New York's] children receive textbooks"; (App. at 56); and (3) "[t]he legislature's desire to foster the study of certain subjects [the sciences, mathematics and foreign languages] . . . ." (App. at 57.) In approving the district court's analysis (App. at 67), the majority below referred to the legislative desire "to promote education in the fields of science, mathematics and foreign languages," and "limited resources." (App. at 67, 69.)

utory scheme denies poor children the equal protection of the laws.[56]

We view this result as mandated by this Court's decisions, for essentially four, interrelated reasons. First, there are less onerous alternatives for satisfying the purported state interests. See, *e.g.*, *Boddie* v. *Connecticut*, 401 U.S. 371, 381-382; *Phoenix* v. *Kolodziejski*, 399 U.S. 204, 212-213. Second, the classifications are not sufficiently tailored to achieving the purported state interests to justify the virtual exclusion of poor children from all educational opportunity. See, *e.g.*, *Kramer* v. *Union Free School District*, 395 U.S. 621, 633; *Bullock* v. *Carter*, 92 S. Ct. 849, 857; *Dunn* v. *Blumstein*, 40 U.S. Law Wk. 4269, 4276, 4279. Third, inadequate weight is given to "the interests of those who are disadvantaged by the classification" (*Kramer, supra*, 395 U.S. at 626, quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30), namely, indigent students without books. Fourth, the approved scheme is one under which the state impermissibly protects "the fiscal integrity of its programs" through "invidious distinctions between classes of citizens." *Graham* v. *Richardson*, 403 U.S. 365, 374-375.

These principles are here applicable. The destructive impact of the scheme on the education of poor children is admitted. The significance of education — "perhaps the most important function of state and local governments" — is analogous to the interests involved in the cited cases, and others upon which we rely;[57] and, like many of those

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[56] The first two claims in the complaint, which petitioners do not press in this Court, did deal with the differing treatment of grades 1-6 and 7-12. The first claim concerned the requirement that free books be provided only for grades 7-12, and the second that the procedural requirement of voter approval applied only to grades 1-6. (App. at 10-11.)

[57] For example, in *Boddie* v. *Connecticut*, 401 U.S. 371, 374, the Court noted "the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship . . . ." As Judge Kaufman stated in dissent below: "Only 'through the looking glass'

cases, this matter involves conduct the *impact* of which is to classify based upon wealth.

1. *The availability of less onerous alternatives.*

This Court has considered material, in assessing a wide variety of constitutional claims, the availability of "less drastic" alternatives for satisfying state objectives. *Dunn* v. *Blumstein*, 40 U.S. Law Wk. 4269, 4276.[58] Here, as we have shown,[59] there are at least two available alternatives for satisfying the purported state interests. First, aid could initially be directed to indigent students in grades 1-12; second, the existing category of services for which districts may levy a tax in the absence of voter approval could be expanded to include texts for grades 1-6. New York is familiar with each method.[60]

Under each of these alternatives, costs to the state would apparently not be higher, and all students in grades 1 to 12, including those from indigent families, would have texts, the maximum possible impact. Accordingly, each alternative would also foster development "in the fields of science, mathematics, foreign languages and other non-sectarian subjects." N.Y. Laws of 1965, Ch. 320, Sec. 1. Thus, all three of the purported state interests would be satisfied. Indeed, as we show below, these alternatives would in certain respects be superior methods of satisfying the asserted state interests.

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might one rank a child's interest in education lower on the scale of this nation's traditional values than an adult's interest in a divorce." (App. at 80.)

[58] See also *Boddie* v. *Connecticut*, 401 U.S. 371, 381-382; *Phoenix* v. *Kolodziejski*, 399 U.S. 204, 212-213; *Carrington* v. *Rash*, 380 U.S. 89, 95-96; *Tate* v. *Short*, 401 U.S. 395, 399-400; *Bullock* v. *Carter*, 92 S. Ct. 849, 857; *Shapiro* v. *Thompson*, 394 U.S. 618, 637; *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354.

[59] See pp. 28-29, *supra*.

[60] See pp. 28 at n. 38, 29, *supra*.

The district court began its analysis correctly, considering the availability of a less onerous alternative. Expressing the *opinion* that texts for grades 7 to 12 are more costly than those for grades 1-6, Judge Travia stated that the alternative of "grant[s] . . . spread thinly" among all students (grades 1 to 12) could, in view of the cost factor, result in a larger number of students being without books. (App. at 56.) The court concluded that "New York State has a legitimate, compelling interest in seeing to it that as many as possible of its children receive textbooks." (App. at 56.)

The court erred, however, in giving full consideration to only one alternative, *i.e.*, "grant[s] . . . spread thinly" (App. at 56), for the search for alternatives must be an exhaustive one. *Carrington* v. *Rash*, 380 U.S. 89, 95-96; *Tate* v. *Short*, 401 U.S. 395, 399-400. Here, New York law demonstrates the feasibility of two alternatives not considered by the district court. Moreover, if the legislature's concern was that "as many as possible of [New York's] children receive textbooks," the alternatives would be superior, for every child, including poor children, would have books.

2. *The statutory scheme is not adequately tailored to achieving the asserted state objectives to justify the challenged impact on children of the poor.*

Cursory analysis demonstrates that if the legislature intended to advance the interests mentioned by the lower courts, the statutory scheme "is extraordinarily ill-fitted to that goal; . . ." *Bullock* v. *Carter*, 92 S. Ct. 849, 857. Providing free texts to a millionaire's children and the many other children in grades 7-12 whose parents can afford texts, while denying them to the poor, does not

maximize the impact of state aid. Nor does it conserve limited resources. Similarly, the state cannot complain about limited resources when it provides assistance in grades 7-12 not only to public schools, but also to "private school[s] which [comply] with the compulsory education law . . . ." N.Y. Education Law, Sec. 701(2).[61]

We note also that the "statement of policy" prefacing the 1965 amendments to Sections 701 and 703, from which the lower courts identified a state interest to promote development in certain subjects, reads as follows:

> This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages *and other nonsectarian subjects.* (Emphasis added.)

The courts below read this provision as if it mentioned only the three named subjects, ignoring the phrase "and other non-sectarian subjects." They then viewed the legislative scheme as giving aid where the three "subjects principally were taught." (App. at 69.) This rationale is faulty, for it is clear from the full provision that the legislature's goals apply equally to grades 1 to 6. (1) The phrase "other non-sectarian subjects" covers every subject in the public schools.[62] (2) Science and mathematics are

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[61] Many "private school[s]" in New York, whose students are eligible to receive free books, have high tuition charges. See *The Handbook of Private Schools*, 52nd Edition, (Porter Sargent, 1971), at 254, 256-257, 269-270, 274, 278, 280 and 281.

[62] See *Board of Education* v. *Allen*, 392 U.S. 236, 248. ["Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, *history or literature*, are used by the parochial schools to teach religion." (Emphasis added.)]

taught in the elementary grades in New York State.[63] (3) Schooling in the elementary years is a necessary foundation for success in classes in the secondary grades. Poor children without books in the elementary grades will not be compensated by having them in grades 7 to 12.

In *Kramer* v. *Union Free Shool District*, 395 U.S. 621, this Court held that provisions of New York law excluding certain persons from voting for school district officers were "not sufficiently tailored to limiting the franchise to those 'primarily interested' in school affairs [the asserted state interest] to justify the denial of the franchise . . . ." 395 U.S. at 633. (Explanation added.) Here, the interest of poor children is in an education — "perhaps the most important function of state and local governments." Given the scatter-shot approach to achieving the purported state interests,[64] in this case similarly to *Kramer*, the legisla-

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[63] In addition, New York State has a program of Foreign Languages in the Elementary School (FLES) which enrolled the designated number of students in the years indicated: 1963—45,000; 1968—83,000; and 1969-70 school year—60,000. The State Education Department has published a series of program and teaching guides which discuss the rationale and suggested content of FLES programs. N.Y. State Education Dept., *French for Elementary Schools*, Albany, 1966, at iii; N.Y. State Education Dept., *Spanish for Elementary Schools*, Albany, 1970, at 3; N.Y. State Education Dept., Center on Information in Education, Basic Educational Data System Statistics for 1969-70.

The guide for Spanish notes, *inter alia*, that "[i]t is generally agreed that children should begin the study of a foreign language at an early age" and that there "is clear and convincing [evidence] that the introduction of foreign language study at the elementary school level . . . contributes greatly to the child's later success in foreign language study." *Spanish Guide*, *supra*, at 1-2. While "the major focus in the FLES program is directed toward the development of conversational skills, the development of reading skills is not neglected." *Spanish Guide*, *supra*, at 38. The guide refers specifically to "FLES texts." *Id.* at 19-21. To the extent that FLES classes do not rely as heavily on texts as other elementary subjects (*e.g.*, reading), they are similar to certain subjects at the secondary level which use texts little, if at all (*e.g.*, shop).

[64] We need not search far for the reasons for this irrationality. The statute refers to books for "other *non-sectarian* subjects . . ." (N.Y.

tion is "not sufficiently tailored . . . to justify the denial of [an 'essential' educational tool]." In sum, the classification is "much too crude." *Dunn* v. *Blumstein*, 40 U.S. Law Wk. 4269, 4279. See also *Rinaldi* v. *Yeager*, 384 U.S. 305, 310.

3. *The special interests of the children disadvantaged by the classification.*

The governing standards require consideration of the "interests of those who are disadvantaged by the classification." *Kramer* v. *Union Free School District*, 395 U.S. 621, 626, quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30; *Phoenix* v. *Kolodziejski*, 399 U.S. 204, 209-212; *Evans* v. *Cornman*, 398 U.S. 419. The question is "whether all those excluded [poor children in grades 1-6] are in fact substantially less interested or affected than those the statute includes [grades 7-12]." *Kramer, supra*, 395 U.S. at 632 (explanation added); *Kolodziejski, supra*, 399 U.S. at 209.

We have quoted the preliminary language of the 1965 amendments to Sections 701 and 703 and shown that the legislature's objectives apply as well to grades 1 to 6 as grades 7 to 12.[65] At a minimum, students in grades 1-6 are not "substantially less interested."

Laws of 1965, Ch. 320, Sec. 1; emphasis added.) And the majority below stated: "The enactment of Sec. 701 provided public funds for textbooks of children in private and parochial schools for the first time in the modern history of New York State. The passage of Sec. 701 resulted in large part from pressure from those whose children attended those schools . . . ." (App. at 70, n. 6.) The wording of the law and the opinion below demonstrate that a dominant concern of the legislature was the desire to create a constitutional underpinning for the providing of books to parochial school students. Accordingly, in assessing plaintiffs' claim, this Court should be mindful not only of the insufficient tailoring, but also that it cannot be confident "that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen." *Williams* v. *Illinois*, 399 U.S. 235, 260 (concurring opinion of Harlan, J.).

[65] See pp. 42-43, *supra*.

Moreover, scrutiny of the interests of poor elementary students demonstrates that in this case there is a sound basis for arguing that the "interests of those who are disadvantaged" by the challenged classification are more compelling than those who have texts. We take this position on the basis of legislation and literature which recognize both the critical importance of early childhood education and the need for special attention to the educational problems of the poor.[66]

First, in 1965, Congress enacted the Elementary and Secondary Education Act, Pub. Law 89-10. Title I of the law (20 U.S.C. 241a-241m) is a comprehensive program for providing federal financial assistance to local school systems with concentrations of children from low income families. The congressional declaration of policy in Section 241a begins by recognizing "the special educational needs of children of low-income families." School systems are required by the law, implementing regulations and other statements of governing criteria promulgated by the Office of Education to concentrate Title I programs in those attendance areas with "high concentrations of children from low income families . . . ." 20 U.S.C. 241 e (a)(1); 45 C.F.R. Part 116, Sec. 116.17(d); United States Office of Education, ESEA Program Guide 44, March 18, 1968, Sec. 1.1.[67]

Second, in April, 1970, Congress amended Title I in Public Law 91-230. Section 132(a) recognizes the importance of projects at the elementary level, requiring, with

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[66] It is proper for the Court to consider these materials. *Phoenix* v. *Kolodziejski*, 399 U.S. 204, 208 at n. 4, 210 at n. 6, 211 at n. 8; *Robinson* v. *California*, 370 U.S. 660, 667, n. 9; *Brown* v. *Board of Education*, 347 U.S. 483, 494, n. 11.

[67] "Educationally deprived children," the eligible beneficiaries for Title I programs, include "children who are handicapped or whose needs for . . . special educational assistance result from *poverty*, neglect, delinquency, or cultural or linguistic isolation from the community at large." 45 C.F.R. Part 116, Sec. 116.1 (i) (Emphasis supplied).

certain exceptions, that Title I funds be used "in pre-school programs and in elementary schools serving areas with the highest concentrations of children from low-income families . . . ."[68]

Third, available expert evidence supports the conclusion of the Congress.[69] It presents the following pertinent propositions: (1) a challenge to earlier notions of genetically determined and fixed intelligence — Hunt (1969, at 191-2); Bloom (1964, at 87-90); Bloom, Davis and Hess (1967, at 12); (2) a suggestion that there is considerable plasticity in intelligence in the pre-school and early elementary years — Bloom (1964, at 87-90; 126-9); (3) and, accordingly, a suggestion that early education is critical — Bloom (1965, at 127-8); Bloom, Hess and Davis (1967, at 12, 16, 22); Hunt (1969, preface at VIII). It is noteworthy that both Hunt (1969, at 209) and Bloom, Hess and Davis (1967, at 30) refer to the absence of books in the home as one of the underlying causes of the educational deficiencies frequently exhibited by poor children.[70]

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[68] The Report of the Senate Committee on Labor and Public Welfare (Senate Report 91-634, 91st Congress, 2d Session) provides the following rationale for the amendment (at 20): "This requirement in part C was adopted by the Committee on the basis of growing evidence which indicates that the early years of education are of paramount importance in a child's development." The Report also states that Title I has focused federal monies on "what may well be the most crucial problem challenging our school systems today: how to educate successfully the children of America's poor." (at 7.)

[69] See Benjamin S. Bloom, Allison Davis and Robert Hess, *Compensatory Education for Cultural Deprivation* (Holt, Rinehart and Winston, Inc., 1967) [cited: (Bloom, Davis, Hess, 1967)]; Benjamin S. Bloom, *Stability and Change in Human Characteristics* (John Wiley and Sons, Inc. 1964) [cited: Bloom (1964)]; J. McVicker Hunt, *The Challenge of Incompetence and Poverty, Papers on the Role of Early Education* (University of Illinois Press, 1969) [cited: Hunt 1969)].

[70] The expert evidence also supports plaintiffs' contention that the book distribution procedure will adversely affect poor children "psychologically [and] emotionally . . . ." (App. at 13.) Many children from culturally deprived families begin school not having had adequate

In sum, while poor children "have interests somewhat different from the interests of [students who have books]" (*Phoenix* v. *Kolodziejski*, 399 U.S. 204, 212), all things considered, they "have a stake equal to that of other [pupils]." *Evans* v. *Cornman*, 398 U.S. 419, 426. Defendants "have not demonstrated a valid basis for distinguishing between . . . two legitimate costs of the [educational] process." *Bullock* v. *Carter*, 92 S. Ct. 849, 858.

4. *The limited resources arguments.*

Each of the lower courts viewed the statutory scheme as a legitimate effort to protect limited state resources. In relying in part on this ground in upholding the legislation, the courts below erred; for a desire to conserve resources can not insulate from constitutional attack legislative classification with the flaws which we have demonstrated in this scheme.[71] *Shapiro* v. *Thompson*, 394 U.S. 618, 633; *Graham* v. *Richardson*, 403 U.S. 365, 374-375; *Mayer* v. *Chicago*, 404 U.S. 189, 197.

In *Shapiro*, followed in *Graham* and *Mayer*, this Court stated (394 U.S. at 633):

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures whether for public assistance, public education, or any other program. But a State may not accomplish such a

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opportunities for "stimulation, language development, and intellectual development . . . ." (Bloom, Davis, Hess, 1967, at 15.) Their experience does not prepare them well for coping with the requirements of public schools. (At 21.) This frequently means that "[a]s each year of school goes by, the culturally disadvantaged child suffers further frustration and failure." (At 21.) The situation involved in this case would aggravate the problem.

[71] See, *e.g.*, pp. 24-29, 38-47, *supra*.

> purpose by invidious distinctions between classes of citizens. *It could not for example reduce expenditures for education by barring indigent children from its schools.* Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. *The saving of welfare costs cannot justify an otherwise individious classification.* (Emphasis added; footnote omitted.)

Here, the saving of costs for education cannot "justify an otherwise invidious classification." The Court's dictum on education almost precisely covers this situation. While children are not barred from school, they are, on this record, "barred" from an essential tool of an education.[72]

The trial court's fiscal resources analysis, approved by the court of appeals, is erroneous in two other respects. First, the district judge assumed incorrectly that alternatives fully satisfying state objectives would be more costly than the challenged scheme.[73] Second, the district court rejected consideration of any alternative involving increased expenditures. (App. at 55.) While it would not appear necessary to reach the point here, we note that states have adopted new procedures involving expenditures of funds in response to many decisions of this Court. *Griffin-Douglas* and their progeny and the landmark decision in *Gideon* v. *Wainwright*, 372 U.S. 335, holding that counsel must be furnished to indigent criminal defendants

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[72] Any reliance by the local defendants on the collection of fees to defray costs would not support a different conclusion. "We are thus left to evaluate the states' asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment. Such a justification was offered and rejected in *Griffin* v. *Illinois*, 351 U.S. 12 (1956)." *Boddie* v. *Connecticut*, 401 U.S. 371, 382.

[73] See App. at 54-55 and pp. 28-29, *supra*.

in state proceedings — are obvious examples. See also *Bullock* v. *Carter,* 92 S. Ct. 849, 858-859. Constitutional rights would be hollow, if states could avoid implementation simply by pleading that expenditures were required.[74]

E. *The Denial of Books to Poor Children in Grades 1-6 Is Not Rationally Based and Constitutes Invidious Discrimination, Even If the Asserted Bases for Distinguishing Grades 1-6 and 7-12 Are Considered.*

The denial of books to children of the poor is not "rationally based and free from invidious discrimination" (*Dandridge* v. *Williams,* 397 U.S. 471, 487), even if the asserted bases for distinguishing grades 1 to 6 and 7 to 12 are considered. First, we have detailed above the invidious discrimination.[75] In summary: (1) a child's personal right to an education is significantly burdened due to his parents' poverty over which he has no control; (2) the child is likely to be stigmatized; (3) the *impact* of the practice is along lines of wealth; (4) and, there are alternatives which would both avoid these injuries and advance the state interests (in a superior fashion).

Second, the statutory scheme is so "extraordinarily ill-fitted" (*Bullock* v. *Carter,* 92 S. Ct. 849, 857) to the state's asserted objectives as to be irrational. Providing books to those who can afford them, but denying them to the children of the poor, neither conserves limited resources, nor maximizes the impact of the state aid. We note again the anomaly of the state's "conserving resources" by providing books for private schools, including those attended by wealthy children.[76]

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[74] See also n. 49 at p. 36, *supra.*

[75] See pp. 27-29, *supra.*

[76] See p. 42, *supra.* The denial of books to poor children does not provide funds to secure texts since their parents are too poor to pay the fee. See p. 26, *supra.*

Contrary to the suggestion of the lower courts, the state's objective was to promote all "non-sectarian subjects," not only science, mathematics and foreign languages. As we have shown, given this objective, it is irrational to deny books to poor children in grades 1-6. Moreover, the poor without books in grades 1-6 will be unable to benefit by having them in grades 7-12.[77] Finally, Article XI, Section 1 of New York's Constitution and the state's compulsory attendance law [Education Law, Sec. 3205(1)(a)] manifest a policy of educating all of the state's children. Their consideration emphasizes the irrationality of denying books to the poor.[78]

III. The Denial of Books to Children from Poor Families in Grades 1-6 Contravenes the Due Process Clause of the Fourteenth Amendment.

The lower court's conclusion that this case presents no due process issue[79] conflicts with decisions of this Court recognizing that the due process clause does protect against arbitrary government infringement of important individual interests, including education. *Meyer* v. *Nebraska*, 262 U.S. 390; *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Bolling* v. *Sharpe*, 347 U.S. 497; see also *Williams* v. *Illinois*, 399 U.S. 235, 259-266 (concurring opinion of Harlan, J.). Moreover, despite its view on due process, the majority below expressed agreement with plaintiffs' allegation that poor children would be stigmatized by the operation of the statutory scheme. See *Wisconsin* v. *Constantineau*, 400 U.S. 433.

In *Meyer*, this Court reversed the conviction of a teacher under a Nebraska law which forbade the giving of instruc-

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[77] See pp. 42-43, *supra*.

[78] See p. 26, *supra*.

[79] (App. at 72.) ("Obviously, though, due process is not involved here.")

tion in a language other than English to a student below the ninth grade. The Court stressed the importance of education and noted Nebraska's compulsory attendance law. *Meyer, supra,* 262 U.S. at 400. The ruling rested, in part, on the premise that the law arbitrarily burdened "the opportunities of pupils to acquire knowledge" in violation of the due process clause. 262 U.S. at 401-403.[80]

Mr. Justice Harlan premised his concurrence in *Williams* v. *Illinois,* 399 U.S. 235, 259-266, on the due process clause, terming the issue whether the challenged legislation "arbitrarily infringes a constitutionally protected interest . . . ." 399 U.S. at 259.[81] Applying a standard expressed in his opinion,[82] he concluded that the Illinois procedure was violative of the due process clause.

This case involves a due process violation, given these controlling principles:

First, an important individual interest[83] is significantly burdened. In *Meyer* "the opportunites of pupils to acquire knowledge" were infringed by a rule forbidding the teach-

[80] In *Bolling* v. *Sharpe,* 347 U.S. 497, this Court held that operation of a dual school system in the District of Columbia violated the due process clause of the Fifth Amendment. The Court concluded: "Segregation in public education is not reasonably related to any proper governmental objective, thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." 347 U.S. at 500.

[81] The majority held violative of the equal protection clause the Illinois procedure allowing imprisonment of an indigent criminal defendant, in default of payment of a fine, beyond the maximum authorized by the statute regulating the substantive offense. *Williams, supra,* 399 U.S. at 244.

[82] ". . . the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen." *Williams, supra,* 399 U.S. at 260 (concurring opinion).

[83] See pp. 19-24, *supra.*

ing of foreign languages. Here, the burdening of the same interest results from the failure of the state to provide indigents an admittedly essential educational tool. The deprivation is more extreme in this case, extending to all elements of the curriculum in which books are used.

Second, with respect to "the rationality of the connection between legislative means and purpose" (*Williams* v. *Illinois*, *supra*, 399 U.S. at 260 (concurring opinion)], we have shown that the statutory scheme is irrational.[84]

Third, we submit that the state interests do not outweigh the impact of the challenged scheme on the critical interests of the children [*Williams* v. *Illinois*, *supra*, 399 U.S. at 262-263 (concurring opinion)],[85] particularly in view of the apparent "existence of alternative means for effectuating the [state's] purpose[s] . . . ." *Williams*, *supra*, 399 U.S. at 260 (concurring opinion).[86]

Fourth, a student's interest in an education is a personal one. *Meyer*, *supra*, 262 U.S. at 401; accordingly, it is patently arbitrary for that interest to be burdened due to a circumstance over which the child has no control, the indigency of his family. *Levy* v. *Louisiana*, 391 U.S. 68, 72. See also *Robinson* v. *California*, 370 U.S. 660, 667 and n. 9; *Boddie* v. *Connecticut*, 401 U.S. 371, 383.

Fifth, as we have noted,[87] in view of the statutory reference to "other non-sectarian subjects," it appears that the legislature's reference to science, mathematics and foreign languages, relied upon so heavily by the lower courts, was designed to provide a constitutional underpin-

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[84] See pp. 24-26, 49-50, *supra*.

[85] One commentary notes about *Meyer*: "The individual's interest in education is personal and important, important enough to subdue the arguably rational purpose of the state to democratize its children and thus to avoid the divisions of sect and creed." Coons, Clune and Sugarman, *supra* n. 21, at 376.

[86] See discussion of alternatives, pp. 28-29, *supra*.

[87] See pp. 43-44 and n. 64, *supra*.

ning for providing books to parochial schools. Thus, with respect to the purported justifications here, the Court can not be "confiden[t] . . . that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen." *Williams, supra,* 399 U.S. at 260 (concurring opinion).

Sixth, our due process contention is buttressed by the acknowledged stigmatization. *Wisconsin* v. *Constantineau,* 400 U.S. 433. As Judge Kaufman stated in dissent below (App. at 79):

> The psychological and social impact of the badge of inferiority implied by their disfavored treatment must extend far beyond the classrooms . . . . The enduring lesson they are thus taught in the public schools they attend without books is that wealth breeds favored treatment while disadvantage leads on to still greater handicaps.

This stigmatization is much more than simply the reflection of private inequality; it is directly attributable to the operation and interaction of the state's education laws in the schools which poor children are required by state law to attend. And unlike *Constantineau,* there is not even a claim of any attempted remedial benefit to those stigmatized.

Conclusion

Plaintiffs sought only declaratory relief on their poverty claim, and did not contest, in the petition, the lower courts' findings of insubstantiality on Claims I and II. Accordingly, this case is not one required to be heard by a three-judge court, and this court has considerable authority in fashioning a remedial decree.[88] This brief shows that plain-

[88] See pp. 13-15, *supra.* Alternatively, this Court might regard the poverty claim as so clearly meritorious that a three-judge court is not required. See *Bailey* v. *Patterson,* 369 U.S. 31.

tiffs' complaint was erroneously dismissed, given the controlling principles set forth in *Conley* v. *Gibson*, 355 U.S. 41, 45-46.

This Court should do more than simply reinstate the complaint, however. In *Boddie* v. *Connecticut*, 401 U.S. 371, the three-judge court also dismissed the complaint without an evidentiary hearing. This Court found the record adequate to hold that the fee requirement for commencing divorce litigation, as applied to poor persons, contravened the due process clause.

The disposition here should be similar to *Boddie*. The Court may regard as established at least the following: New York requires students between the ages of 6 and 16 to attend school; textbooks are "essential" for meaningful participation in the educational process; the fee requirement operates to apportion educational opportunity along lines of wealth; poor children have a special interest in texts; poor children sitting bookless in the classroom will be stigmatized; less drastic alternatives are available; educational opportunity is of great importance. In addition, plaintiffs made affidavits that they received public assistance and were unable to pay the fee; the local defendants generally denied the claim of inability to pay.

We submit that this Court should:

(1) declare that the denial of textbooks to children because of their parents' inability to pay the rental fee contravenes the equal protection clause of the Fourteenth Amendment;

(2) declare that poor children have a right to free textbooks;[89]

(3) remand the case to the district court for identi-

[89] Since the child's right is at issue, it would be appropriate to include any child whose parents' failed to pay the fee by reason of poverty, neglect, etc. See pp. 24-26, 28, *supra*.

fication, on an expedited basis, of the members of the class entitled to receive free texts.[90]

Alternatively, in the event the Court regards plaintiffs' poverty claim as one which must be heard by a three-judge court pursuant to 28 U.S.C. 2281, the decisions below should be vacated and the case remanded for the convening of a three-judge court. As shown in this brief, the poverty claim is "not plainly insubstantial." *Schneider* v. *Rusk*, 372 U.S. 224, 225.[91]

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The United Ministries in
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April, 1972

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[90] This Court has expressed, albeit in another context, the need for promptly remedying denials of equal educational opportunity. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19. This case was filed at the start of the 1970-71 school year.

[91] Judge Kaufman stated, in part: "I dissent and would hold that plaintiffs have established at the very least a substantial claim that *as applied in* . . . District No. 27 . . . New York Education Law Sec. 703 deprives indigent children of the equal protection of the laws." (App. at 74; emphasis added; footnote omitted.) "[T]he essence of the claim is unequal educational opportunity based on wealth. The state has not justified the inequity sufficiently to warrant the refusal to convene a three-judge court." (App. at 81.)

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-5685

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR.,

DAISY JOHNSON, *et al.*,

Petitioners,

vs.

NEW YORK STATE EDUCATION DEPARTMENT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF AMICUS CURIAE OF AMERICAN FEDERATION OF TEACHERS WILLIAM H. CLUNE III JOHN E. COONS AND STEPHEN D. SUGARMAN IN SUPPORT OF PETITIONER CHILDREN.

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DAISY JOHNSON, *et al.*,

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BRIEF AMICUS CURIAE OF AMERICAN FEDERATION OF TEACHERS WILLIAM H. CLUNE III JOHN E. COONS AND STEPHEN D. SUGARMAN IN SUPPORT OF PETITIONER CHILDREN.

We present this brief in support of petitioner children with the consent of the parties pursuant to Supreme Court Rule 42.

The opinion below of the United States Court of Appeals for the Second Circuit is reported at 499 F.2d 871 (2d Cir. 1971).

Interest of Amici.

American Federation of Teachers.

The American Federation of Teachers is a voluntary association of education workers, which was founded in 1916. It has more than 275,000 members throughout the United States. The purpose of the organization is to elevate the character and advance the interests of the occupation of teaching and to promote the cause of education in the United States. In furtherance of this purpose, AFT has long worked to insure the adequate and equitable financing of public education throughout the nation. The AFT has worked for more than a half century to provide for equal educational opportunity for all American children. Though the present case challenges only a single aspect of a complicated school financing system for a single state, it raises the applicability of the Equal Protection Clause to state allocation of resources to school children, an issue which has major implications for the financing of public education in every American community, urban, suburban and rural. For all these reasons the American Federation of Teachers joins in presenting this brief.

Individual Amici.

Amici are private disinterested individuals who have been writing and publishing on the problems of discrimination in the distribution of educational resources for a number of years. Their interest is that of scholars concerned that the present issue be resolved in a manner befitting our constitutional system as well as fulfilling the educational aspirations of a free society. Petitioners in this case include children and their parents. This is a class action. Amici present this brief

specifically on behalf of the children petitioners whose interests in some cases may be different from their parents.

Summary of Argument.

Through Sections 701, *et seq.*, of its Education Code, the State of New York has established a system for the provision of class books in its public elementary schools which operates in a particularly invidious manner. The New York public education system is a multi-billion dollar operation; yet some children in some districts are denied functional access to that system because they are denied schoolbooks. For a small cost saving the state is doing great injury. Amici ask this Court squarely to hold that education is part of a child's First Amendment rights of speech and association and that to condition his access to those rights upon the payment of a fee by a third party constitutes a denial of equal protection of the law under the Fourteenth Amendment of the U.S. Constitution.

This brief has two areas of special concern: First, it deals with the need for heightened judicial solitude because of the unique relationship of the class of injured petitioners and the interest at stake. Second, it emphasizes the ways that education is planted on the feet of the constitutionally fundamental rights of speech and association.

ARGUMENT.

Introduction:

Under Either the "Close Scrutiny" Test or the Traditional "Rationality" Test, Petitioner Children Are Denied Equal Protection of the Laws by New York State Statutes Which Permit the Conditioning of Their Receipt of School Books Upon the Payment of a Fee.

Petitioners argue that to condition their access to public school books which are employed as the basic texts for elementary courses upon the payment of a fee gives rise to an invidious discrimination which denies to them the equal protection of the laws. Amici support this position.

While there has been much debate about the reach of the equal protection clause, recent opinions of the Court make clear the analytical process that is to be employed. Mr. Justice Marshall, speaking for the Court in *Dunn v. Blumstein,* 40 U.S. Law Wk. 4269 (March 21, 1972), which strikes down durational residency conditions upon the right to vote, sets out the analysis succinctly: "To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Id.* at 4271.

The Court then goes on to say "In considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test, depending upon the interests affected and the classification involved." *Id.* at 4271. Amici submit that there are essentially two tests; or, better put, a State is held to one of two standards in defending the constitutionality of its challenged law. This point is neatly stated by

Chief Justice Burger in *Bullock v. Carter,* 40 U.S. Law Wk. 4211 (February 24, 1972), which strikes down filing fee conditions on the right of a candidate to enter a primary election: "The threshold question to be resolved is whether the filing fee system should be sustained if it can be shown to have some rational basis or whether it must withstand a more rigid standard of review." *Id.* at 4214. He calls that latter standard the "close scrutiny" test. Mr. Justice Blackmun in *Graham v. Richardson,* 403 U.S. 365 (1971), dealing with the rights of aliens to welfare, uses essentially the same approach, saying "Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis. . . . But the Court's decisions have established that [certain] classifications . . . are inherently suspect and subject to close judicial scrutiny." *Id.* at 371-372. A number of decisions have phrased the "close scrutiny" test as one in which the State must show that the classification is "necessary to promote a compelling state interest." See *Dunn v. Blumstein,* 40 U.S. Law Wk. at 4272, *Kramer v. Union Free School District,* 395 U.S. 621 (1969), *Williams v. Rhodes,* 393 U.S. 23 (1968).

This case is one which invokes the "close scrutiny" test, calling for the State to justify the challenged classification as necessary to support a compelling interest; in addition, however the State's interests with respect to the challenged discrimination are so weak or unrelated that they cannot be justified even under the more tolerant "rationality" test. Because of Amici's belief in the constitutionally fundamental importance of the interest of the petitioners that is here at stake, we turn in Part I to the "close scrunity" test and analysis. In Part II the application of the "rationality" test and analysis shall be considered.

PART I.

THE CLOSE SCRUTINY TEST IS OFFENDED BECAUSE THE RIGHT ASSERTED IS CONSTITUTIONALLY FUNDAMENTAL, THE CLASSIFICATION IS SUSPECT, AND THE DISCRIMINATION IS UNNECESSARY TO THE STATE'S OBJECTIVE.

After the unanimous opinion in *Bullock v. Carter, supra,* it seems firmly established that poverty may not serve as a barrier to the enjoyment of certain constitutionally fundamental interests. This case may be viewed, then, as one of those in the line including *Griffin v. Illinois,* 351 U.S. 12 (1956); *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966); and *Bullock v. Carter, supra,* in which petitioners challenged a state rule which imposed a fee upon the exercise of a constitutionally fundamental interest. The interest here at stake is that of children in education; that such interest is constitutionally fundamental is the core of this brief. Before turning to the fundamentality of education, however, Amici wish to emphasize the invidiousness of the fee payment requirement.

A. Conditioning the Access of Children to Classbooks Upon the Payment of a Fee Is a Particularly Invidious Discrimination.

1. The Consequence of Forcing Some Children to Attend School Without Books Is Educationally Disastrous.

Seemingly stating what it thought was obvious, the Court in *Shapiro v. Thompson,* 394 U.S. 618 (1969), observed:

> [The State] . . . could not, for example, reduce expenditures for education by barring indigent children from its schools. *Id.* at p. 633.

It is bitter irony that this is effectively the situation that petitioners face.

Taking a disinterested view of the challenged practice, it is difficult to imagine a more efficient policy for crushing whatever hopes these children have of becoming participating members of this society. Its effects must inevitably resound in ever corner of the child's life and personality—now and in the future. Confining our attention to his school experience two general effects upon the child may be emphasized. First is his failure to master the content of education; the second is the labeling of the child as a person of none or little personal worth. Both the majority below and the defendants concede both effects, but a word or two more is appropriate.

The child's plight must be viewed in the context of complusory education. The fact that school attendance is legally mandatory has powerful bearing on the state's constitutional obligation. It may be that in a purely voluntary system the state would have no duty either to provide educational services or to equalize those it did provide. The element of compulsion, however, changes all that. Compulsory school attendance is a drastic imposition upon the individual's freedom of action and association, a massive system of regimentation justified only by the overriding benefits which education yields both to individual and society; deny those benefits, and the burden on liberty becomes insupportable.

The plain fact is, however, that bookless children are not getting the education which provides the justification for compulsion. They are not learning reading, or, if they are, it is no fault of the school. Further, the

deprivation is here given a sharper edge because other children in the same classroom do have books. This makes the harm more serious than in *Griffin v. Illinois, supra.* There, although the rich could afford trial transcripts while the poor could not, rich and poor were not competing with each other for limited opportunities for jobs or college admission. Hence, a benefit for the rich did not itself hurt the poor. Here, all school children are in competition, a competition that will shape their future roles and participation in society. Under a system which is designed to operate for the benefit of students who have books, the bookless suffer a most onerous handicap. In short, to be bookless is effectively to be excluded from the competition.

Instead, what the bookless children are learning is that the government to which they pledge their allegiance each morning is providing others with education while it provides them with compelled custody and daily humiliation. They are learning that school is the springboard to full personal life in this society—for those other children with the key to the public system. For themselves the experience is a conditioning exercise for the sure-to-fail. This discrimination is so utterly crude it is almost comic in its hyperbolic favoritism for the well born.

2. Children Form a Powerless Class Specially Protected by the Fourteenth Amendment.

Whether a particular child enjoys the intended benefits of public education in Hempstead depends entirely upon his luck. Being enrolled in public school is insufficient; he must also have been born in the right home.

Politics may or may not help him, but clearly there is nothing that he himself can do to help politics along. He must await the beneficence of others, because he bears the "unalterable trait" of childhood. He has neither money nor vote. He is but one of a unique minority which is (we might say) disenfranchised by its very minority. There is some danger that this may be viewed merely as an advocate's effort to be artful with a purely formal and technical point. Children, it may be urged, are "represented" politically by the votes of their parents. However, for two good reasons this answer suffers even more from formalism than does the objection itself.

First, the truth is that a very significant number of children do not have voting parents. This parental failure to vote is a neglect of the child's interest that he is helpless to alter. Second, even the parent who does vote is inevitably subject to many influences that conflict with the educational interests of his children. Every other public program competes with education for voters' (adult) support. It would be quite unrealistic to imagine that, on educational issues, parents vote as would their children if those children were themselves franchised and aware of their self-interest. For both these reasons the proxy suffrage through the parental franchise must necessarily be seriously defective in its representation of petitioners' class.

That defect is a justification for "heightened judicial solitude" by this Court for the plight of the children who now seek its aid. *Graham v. Richardson, supra,* 365 U.S. at 372. Plaintiff-children qualify as one of those "discrete and insular minorities" which are special objects of judicial protection. *United States v.*

Carolene Products, 304 U.S. 144, 155 (1938). The opinion in *Breen v. Kahl,* 296 F. Supp. 702, 708 (W.D. Wis. 1969), well summarizes the predicament of the student:

> . . . students . . . do not vote in school board elections; political redress of their grievances is not open to them; theirs is a situation in which judicial vindication of constitutional protections has been considered particularly appropriate. . . . Cautious counsel to avoid judicial involvement in serious constitutional issues merely because they concern younger people, in my view, is neither prudent, expedient, or just. It is time to broaden the constitutional community by including within its protections younger people whose claim to dignity matches that of their elders. See *In re Gault,* 387 U.S. 1, 87 S. Ct. 1428, 18 L.Ed.2d 527 (1967).

Their utter helplessness has been a source of the common law's tender concern for children from the days of the Yearbooks. See generally Blackstone, *Commentaries* (Jones ed.), Book I, Chs. XVI-XVII, 446-466 (San Francisco, Bancroft-Whitney, 1915). Special rules for the protection of minors formed a significant part of what tradition knew as the "Law of Persons". Today most of these protections have been codified. This is not to suggest that every constitutional claim advanced by or on behalf of a child has special weight, but only that the best interests of children, as courts have identified them, will weigh heavily—even in the constitutional scale. *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Application of President and Directors of Georgetown College,* 331 F.2d 1000, 1008 (D.C. Cir. 1964).

Plaintiff children are not in their present misfortune because they deserve education less: Indeed, as far as the record discloses, each is indistinguishable from his peers. He is a child, merely another part of that natural democracy of children—all poor, all helpless, all dependent upon society. That these children should have been singled out from their peers as they have is but the curious effect of state policy. New York has decided that it will provide quality education to those children who find an adult to sponsor them—and some never find one.

Thus for all pupils the principal benefits of this multi-billion dollar public enterprise depend upon the payment of fees by third parties. Such an apparatus is not merely bizarre; it is a public humiliation and an unmerited badge of inferiority for the child of poor or obdurate parents. In this respect these pupils are in a position strikingly similar to victims of racial or other unjustified discrimination. They are made to suffer by the "unalterable trait" of lineage or childhood. *Lindsey v. Normet*, 40 U.S. Law Wk. 4184, 4189 (February 23, 1972).

B. Education Is a Constitutionally Fundamental Interest.

Petitioners and other amici, no doubt, will deal at length with the vital role of education in our society. Hence, on the general fundamentality of education, we can be very brief. The essence of the argument is this: Education is crucial to both state and individual in a rich variety of ways—social, economic, intellectual, and political. It cannot be dismissed as merely social and economic or as "merely" anything. It is too rich in its implications to be captured in a formula. To appreciate the fundamentality of education it must be viewed in

all its many aspects—intellectual, political, social and economic. This is a theme familiar and congenial to the Court from its long consideration of education in the racial context. In fact it is one of the most common themes in our vast social literature. If there is any activity accepted as fundamental in our society, surely it is education. For a general discussion of the question see *Serrano v. Priest,* 5 Cal.3d 584 at 604-610, 487 P.2d 1241 at 1255-1259; Coons, Clune, and Sugarman, *Private Wealth and Public Education,* (Cambridge, Harvard University Press, 1970) at 364-366, 370-373, 387-393, 397-419.

Amici, here, wish to emphasize but one aspect of education, the aspect which we believe is most significant: This is education's direct tie-in to First Amendment rights of speech and association. We seek to reaffirm education's place among those "rights" and "fundamental interests" which are of peculiar juridical importance because they are essentially intellectual activities (e.g. speech, press, thought) and/or political activities (e.g. voting and association) and thus, in either case, are ". . . vital to the maintenance of democratic institutions". *Schneider v. State,* 308 U.S. 147, 161 (1939). Of course, any distinction between intellectual and political activities is artificial; the two are indissolubly linked in their crucial role as guardian of a free society. *Shelton v. Tucker,* 364 U.S. 479 (1960). Only a people which steadfastly remains both intellectually and politically "open" retains the capacity for perpetual self-renewal. A society may abide the widest range of social and economic experimentation through legislation without losing the power to reform itself—so long as it rejects efforts by government to encourage permanent intellectual or political classes and orthodoxies.

Hence the Court has viewed its first responsibility to be the protection of the sources of public communication and political participation from government constraint and discrimination.

Within this classic framework the Court has selectively considered the application of the Equal Protection clause to a wide variety of legislative classifications involving many different human needs and activities. While sometimes tolerating the most poignant of merely personal economic deprivations, as in *Dandridge v. Williams,* 397 U.S. 471 (1970), it has held the state to the highest standard of fairness in matters affecting politics and speech. In these areas the Court has been virtually unanimous. Thus in *Williams v. Rhodes, supra,* Mr. Justice Black himself emphasized for the majority that the intertwining speech and political rights there asserted ". . . rank among our most precious freedoms . . .", and for this reason trigger a special burden of justification by the state. And where the First Amendment was implicated in *Cox. v. Louisiana,* 379 U.S. 536 (1965), again it was Justice Black insisting upon the state's duty of neutrality in the provision of opportunities to hear and be heard. "To limit access . . . to some views but not other . . ." is forbidden as an "invidious discrimination". 379 U.S. at 579-580.

Amici argue that education stands squarely planted on the constitutional feet of politics and speech. Education is at once a political activity of the first order and *the* primary influence of the state upon the intellectual life of its citizens. The majority below cites *Dandridge v. Williams, supra,* and asserts that education is a "social and economic" interest. As far as it goes that is quite correct. Education's significance in this respect

could scarcely be denied. However, no matter how important the social and economic effects of education may be and however much these add to its constitutional status, it is chiefly education's political and intellectual character which give it its constitutional fundamental stature.

1. Education as an Aspect of the First Amendment Right to Know.

In some contexts this Court has described education specifically as a right encompassed by the First Amendments guarantee of freedom of speech, tracing the relevant judicial history to the 1920's. Thus in *Griswold v. Connecticut,* 381 U.S. 479 (1965), the Court states that ". . . By *Pierce v. Society of Sisters, supra,* the right to educate one's children as one chooses is made applicable to the states by the force of the First and Fourteenth Amendments". 381 U.S. at 482. In *Tinker v. Des Moines School District,* 393 U.S. 503 (1969), the Court again interpreted *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) and *Meyer v. Nebraska,* 265 U.S. 390 (1923) as based upon the First Amendment and spoke of the rights of students, as students, arising thereunder. 393 U.S. at 506-07. See also *Epperson v. Arkansas,* 393 U.S. 97 (1968).

Technically, it may have been stretching a point for the Court to cite either *Pierce* or *Meyer* as First Amendment cases. Each is, formally speaking, an example of substantive due process, and neither specifically mentions the First Amendment. Nevertheless, the Court is clearly correct in its modern interpretation of these cases, for their very core is the recognition that education's impact upon the personality, intelligence, and loyalties of children raise fundamental issues of free-

dom of the mind. It is not surprising that *Pierce* and *Meyer* show a current vitality uncharacteristic of substantive due process decisions generally.

The ways in which speech and education interpenetrate are diverse, and not all of them are at stake here. For example, here there is no active frustration by the State of a particular attempt to communicate such as that presented in *Tinker v. Des Moines, supra.* What is involved is another aspect of free speech—the right to know and to receive information. That right has been repeatedly declared by this Court. Thus *Sweazy v. New Hampshire,* 354 U.S. 234, 250 (1957), speaks of the right of students ". . . to inquire, to study and to evaluate, to gain new maturity and understanding . . ." and *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967) describes the classroom as a unique example of the "marketplace of ideas". Of course, the right to receive information is enjoyed by more than schoolboys, *Stanley v. Georgia,* 394 U.S. 557 (1969), and is sufficiently precious that it moved this Court in *Lamont v. Postmaster General,* 381 U.S. 301 (1965) to the first invalidation in history of a federal statute on First Amendment grounds. The unanimous decision in that case deserves additional attention.

The *Lamont* decision struck down the federal act and regulations which required addressees of "communist political propaganda" to specifically request such mail before it would be delivered by the postal authorities:

> The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the *Lovell, Thomas,* and *Mur-*

> *dock* cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of mail. . . . the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. 381 U.S. at 306-07.

In *Lamont* not only was the intended recipient of speech recognized as the locus of the First Amendment right, but the protection of the flow of ideas to him extended even to unsolicited information. *Lamont v. Postmaster General,* 229 F. Supp. 913, 916 (S.D.N.Y. 1964). In this regard a comparison of *Lamont* and the instant case is instructive. New York has created an enormous system for promoting the flow of a very particular set of information and ideas to a very particular set of recipients including the plaintiff children. This flow is invested with such importance by the State that it constrains the intended recipients by law to join the system and attend to its messages. For their part the intended recipients have expressly indicated (if not otherwise, by this very litigation) their strong interest in receiving this information.

In all respects the comparison to *Lamont* favors plaintiff children. Their right to receive the coveted learning is scarcely inferior in status to that enjoyed by the casual addressee of an unsolicited piece of mail. Similarly, a comparison of the relative burdens imposed on speech favors the instant claim. New York has cast upon plaintiff children an "affirmative obligation"—here the acquisition of books—as a precondi-

tion of equal access to the flow of ideas. In *Lamont* the mere requirement that the addressee request the mail was held "an unconstitutional abridgement of the addressee's First Amendment rights" that outcome is all the more justified here where the affirmative obligation cannot even be performed by the very person affected; that is, the child must depend on a third person to provide the key to the information system.

The practical effect of the New York practice is a crushing burden upon the right to know. Plaintiff-children are effectively limited in their employment of the *public* information system by the fee payment requirement. It is no answer to this that the state has no duty to promote the flow of ideas. Having chosen to do so it may not proceed upon the basis of what is essentially a discrimination by wealth and lineage, *Lindsey v. Normet, supra,* at 4189.

The protection of the right here asserted is supported by every consideration which has historically moved this Court in speech cases. Education and speech share the common objective that inquiry and debate in our nation remain informed and vigorous. It is even false to their nature to separate the two by the conjunction; education *is* speech, just as speech is always a form of education. And, if speech be precious, the full measure of judicial concern must likewise focus on those in our schools for whom the message of public education is designed.

2. Education as an Aspect of the First Amendment Rights of Political Expression and Association.

This argument, like the last, deals with education/speech. It differs only in its concentration upon the political side of the petitioner pupils' future life as citizen. It argues the existence of an important relation

between what is happening to that child in the Hempstead schools and what can be expected of him later as a decision maker in a democratic society.

This Court has identified a wide variety of political expression and associational activity specially protected under the First and Fourteenth Amendments. See generally Lockhart, Kamisar, and Choper, *Constitutional Law*, 766-1020 (St. Paul, West, 1967). These "recognized rights" have a common quality—all are designed to protect the citizen's role in the democratic political process by assuring both his access to ideas and his opportunity within the law to associate to promote such ideas as he supports.

This central concept is so well and so long established that the multiplication of precedent would be pointless. Much of it is summarized in the terse expression of the majority in *Whitney v. California*, 274 U.S. 357 (1927).

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. 274 U.S. at 375.

The interest at stake is speech to be sure, but clearly it is more than the mere right to speak. The audience is at least as important as the speaker. Meiklejohn puts it nicely:

> "[I]n . . . political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers . . . [A]s the self-governing community seeks . . . to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails." Meikle-

> john, *Free Speech and its Relation to Self-Government* (1948), reprinted in Lockhart, Kamisar, and Choper, *supra,* at 789.

Thus, the cherished protection is not merely for the speaker or even the particular audience; it is for all of us:

> The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California,* 283 U.S. 359, 369. *New York Times v. Sullivan,* 376 U.S. 254, 269 (1964).

It is the *total system of free political discussion* that is crucial; it is the frustration of the system by government that is forbidden. And if it be the case that public education is indispensable to full and fruitful political intercourse, then the character of its dispensation is a speech issue of grave consequence.

That, of course, is the essence of the proposition here asserted. It is direct and simple: Education is not only important to political intercourse; it is the very gateway to all effective participation. It is that human activity which alone can justify the epistemological assumptions of a political democracy. Without it the constitutional dependence upon popular participation is merely absurd.

Thus when the state provides education it is engaging the child in perhaps his first—and certainly his first organized—political experience. On a mass basis the state deliberately—and properly—affects the character of our political life in two distinct but related ways. First, through prescribed curricula the state largely fixes the major concepts and content of our political discourse. Secondly, and more important, the acquisition of skills and general culture through education powerfully conditions the young citizen's general capacity for effective participation in the life of his society, including government.

The recent opinion in *Serrano v. Priest, supra,* makes much of this political aspect of education:

> At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities.
>
> The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values. 5 Cal.3d at 608, 487 P.2d at 1258.

This Court has never before been asked to protect the interest in education as part of the rights of speech and political association. Amici believe it expedient for the Court now to do so because of education's unique impact upon the child's development as a citizen. Education is the very foundation of community life, of effective participation in the political process, of the

consensus of shared democratic values. By transmitting the deposit of learning to the young, education enables our pluralistic society to identify itself as a people with a common destiny. As shaper of the child's capacity for civic contribution, education is indistinguishable from and an integral part of the rights of speech and association. When the State discriminates against children in the provision of education, it corrupts the very sources of free discussion and civic virtue.'

Seeing this special role of education helps to correct the view of the majority below concerning the relevance of *Dandridge v. Williams, supra,* and *James v. Valtierra,* 402 U.S. 137 (1971). The basic theme of the majority respecting these cases seems incorporated in a sentence on p. 879:

> [A]lthough education is no doubt an area of fundamental importance, the Supreme Court has made clear its view that in the area of social welfare, the "compelling state interest" theory does not apply even though basic needs may be involved.

This misses the point. Mr. Justice Stewart in *Dandridge* carefully avoided any such sweeping limitation and made quite plain that merely affixing a label such as "social welfare" or "social and economic" will be insufficient to divert the Court's scrutiny:

> . . . [H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. 397 U.S. at 484.

If anything is plain in the instant case, it is that the discrimination is not limited to social welfare and that it does affect speech and association—"freedoms guaranteed by the Bill of Rights." Indeed, as argued at length above that specific injury is what the case is all about. (And it is not merely "some disparity"; for the petitioner-children the result is "educationally disastrous".) To speak of the interest here as "social welfare" is to reduce the education of human beings to the level of their stomach. Did the majority below come to suppose that the constitutional relevance of an interest is to be determined merely by its importance to the creature comfort of the individual? They suggest as a reductio ad absurdum:

> Certainly no one would contend that a student's need for textbooks is any more fundamental than such items as food and clothing which are provided through welfare grants. 449 F.2d at 879 (f.n. 11).

But of course that is precisely what we do contend. A child's mind is constitutionally distinguishable from his stomach. *Dandridge* may reject "economic needs of impoverished human beings", as the criterion of fundamentality, 397 U.S. at 485, but this scarcely implies that discrimination respecting development of human intelligence is of the same order. Indeed, *Dandridge* explicitly states the opposite, citing *Shelton v. Tucker, supra,* as an example of a general area in which the Court's intervention would be appropriate. 397 U.S. at 484.

James v. Valtierra, supra, is an inappropriate analogy for a like reason. The interest at stake in that case was housing. One could readily concede the *importance* of that interest to the affected individuals without conceding its constitutional relevance. Conversely its nonfundamentality tells us nothing about the issue here. Housing and welfare both being almost purely economic and social interests, the conclusion of the majority below with respect to education is simply a non sequitur.

C. The Injury to Petitioners Is Not Necessary to Promote Any Compelling State Interest.

The book rental fee requirement must be justified by the most compelling exigencies of government. But the weightiest countervailing state interest here advanced is economy. Such a consideration is quite insufficient to submerge the right asserted. As with the costs of littering imposed upon government by handbill distribution ". . . Any burden imposed upon the . . . authorities . . . results from the constitutional protection of the freedom of speech and press". *Schneider v. State,* 308 U.S. 147-162 (1939).

Rather than further detailing possible state interests here, Amici will postpone that discussion until the "rationality" test is considered in Part II below, for indeed there is not even sufficient and relevant justification for the fee under the traditional equal protection analysis.

PART II.

THE RATIONALITY TEST IS OFFENDED BECAUSE THE BOOK RENTAL FEE REQUIREMENT IS NOT REASONABLY RELATED TO STATE OBJECTIVES.

A. The Rental Fee Requirement Arbitrarily Injures Children Because of the Wealth or Behavior of Their Parents.

The opinion below fails to distinguish relevant subcategories of the class represented by plaintiff pupils. The total class of pupils injured by the challenged state system is composed of all children who—for whatever reason—do not have access to those books required for participation in the courses of study mandated by the state. This larger class may be broken analytically into at least two groups. The first is composed of those children whose parents or guardians would have provided the rental money but for their indigency; it is on these children that Part I of this brief has focused. The second group is composed of those children who are bookless for any other reason, including parental whim or selfishness.

The opinion below treats plaintiffs simply as "indigent children". By this expression the court clearly means that they are the children of indigent parents; it is not the child's own economic status that is thought to be relevant. In most contexts this would be a sensible view; truly speaking all children are poor and the relevant distinction among them is parental wealth. However, in the circumstances of this case this merger of child and parent by the majority below obscures what is an important factor—the separate and independent status of the child's right.

This confusion still would be inoffensive if the plaintiffs here were clearly members of the first group—

those whose parents did not pay the rental fee because of poverty. In that event the interest of child and parent would in truth be functionally indistinguishable. This is not to suggest, however, that the discrimination would be rational.

With respect to this group of children with poor parents, it is clear that the wealth classification should play a distinct role in the application of the traditional or rationality test. This Court has made clear that the very employment of a wealth distinction by the State in its dispensation of benefits and burdens can cast in doubt the rationality of the device. Thus, in *Harper v. Virginia, supra* at 668, the majority stresses that a voter's affluence has no reasonable relation to the purpose of the franchise. And most recently in *Lindsey v. Normet, supra* at 4184, the majority opinion by Mr. Justice White voids a financial burden on appeals in forcible entry and detainer cases for its very irrationality. Citing *Griffin v. Illinois, supra,* and other indigence cases the opinion emphasized the self-defeating function of a state policy which first makes the appeal available and then effectively eliminates it for those who need it most.

Because petitioners are children, the fee requirement is also arbitrary because it hurts those whose parents have the funds yet do not provide the book fee. The point here is that the child's right is independent of the parent. Pupils are not simply extensions of their parents or guardian. The parent may enjoy an area of primacy in the selection of the style and content of education, at least for young children. *Pierce v. Society of Sisters, supra.* Nevertheless, the separate interest of the child is manifest in the limitations imposed on both parental and state power.

The New York state decisions on the parental *duty* to educate exemplify this position. *Shapiro v. Dorin*, 99 N.Y.S. 2d 830 (1950) is typical. In protecting the child from parental neglect of this duty the court remarked:

> Public Education Laws are the outgrowth of social legislation designed to give equality of opportunity to all children in a society dedicated to the democratic ideal. Without equality of opportunity in education there is no equality among the children of our democratic society. This has recently been made clear by the Supreme Court in Sweat v. Painter, 339 U.S. 629, 70 S.Ct. 848; McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 S.Ct. 851. . . . The kind and quality of education our children receive have like bearing upon whether they will in later life be able to take their rightful place in civil society. . . . *Id.* at pp. 834-835.

Shapiro v. Dorin, like most of the reported decisions involves a conflict between the parent and the state over the child. This tends to obscure the independence of the child's own right, making him seem the creature of one or the other. But he is no one's creature. This is confirmed in the many decisions involving custody and other rights respecting children. Here the touchstone is "the interests and welfare of the children." See e.g. *Bunim v. Bunim*, 298 N.Y. 391, 83 N.E.2d 848 (1949). In many states the child's own preference is relevant in custody cases. See e.g. *Smith v. Smith*, 15 Utah 2d 36, 386 P.2d 900 (1963).

This Court has never been faced directly with an explicit conflict between the child on the one hand

and both parent and state on the other. Occasionally, however, it has recognized the separate character of the child's right. One example is *Prince v. Massachusetts, supra.* Here the parent and child were aligned against the state, but the opinion repeatedly notes that the child has rights which he enjoys as his own. Of course, the decision in *Tinker v. Des Moines, supra,* rests entirely upon the students' own right to free speech though it involved no conflict with parental interests. There, as in *In re Gault,* 387 U.S. 1 (1967), the Court gave recognition to the independent constitutional personality of children and students.

The most explicit and highly relevant affirmation of the child's separate right is the recent decision in *Chandler v. South Bend Community School Corporation,* Civil No. 71 S 51 (U.S.D.C., N.D., Indiana) decided August 26, 1971. *Chandler* involved the refusal of parents either to pay certain school fees or to have them excused by a parental statement of indigency. As a consequence of that refusal, plaintiff children were excluded from certain school opportunities. The court held this practice a violation of the children's rights under the Equal Protection clause. The language of the opinion is explicit on the point of the child's status:

> . . . Defendant herein has totally failed to present any reason why the Plaintiff-students should incur sanctions for their parents' failure to pay school fees. The school fee collection procedure as applied to these minor-Plaintiffs, conditions their personal right to an education upon the vagaries of their parents' conduct, an intolerable practice. . . . (Slip opinion, p. 5)

It would be one thing for the state to decide that parents shall have the choice whether children shall attend school. It is quite another to establish a universal compulsory system, define the appropriate experience so as to require books for its enjoyment, and then relegate the provision of books to an independent private decision.

B. The Classification Is Both Inconsistent With State Purposes and Unnecessary.

The first question here is whether the classification of plaintiff children by their parents' wealth or choice bears a "reasonable relationship to any valid state objective". *Lindsey v. Normet, supra.* If such classification either fails to advance the state objective or is "unnecessary to assure" its accomplishment, ". . . the discrimination against the class . . . is arbitrary and irrational . . ." Id. at 4191. It is not enough that the practice advance the objective; the practice must be reasonably "necessary" to that end. If it can be achieved without imposing the burden, the state's insistence upon the classification becomes punitive and irrational. *Carrington v. Rash,* 380 U.S. 89 (1965); *Rinaldi v. Yeager,* 384 U.S. 305 (1966).

In *Lindsey v. Normet, supra,* the state required unsuccessful tenant defendants in forcible entry and detainer actions to post a bond for double rent as a condition of appeal. This Court found the requirement both ". . . unrelated to actual rent accrued or to specific damage sustained by the landlord . . ." and ". . . unnecessary to assure . . . payment of accrued rent . . ." 40 U.S. Law Week at 4191. The irrationality of the double-rent bond was particularly evident in its

effect upon the poor, for it largely frustrated the state's own purpose in providing a system of appeals:

> The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. *Id.*

Let us then put New York to the test. Does its practice promote its own policy? And, if so, is this practice the only reasonable manner in which that policy may be promoted?

First one must identify New York's policy objective respecting the education of primary students. What is its relevant "purpose"? The majority seeks it in the legislative statement which accompanied the challenged §§701. et seq. 449 F.2d at 877. However, this entirely misconceives the issue by fastening upon but one element in a complex system of public education. One might even concede (we do not) that the limited purpose vaguely expressed in that preamble was in fact advanced. This does not render irrelevant the larger purposes held by the legislature for the whole system. If the legislation effectively frustrates those larger purposes, it may fail even though it accomplishes some relatively minor objective. Indeed, it would be difficult to imagine a legislative classification that accomplished literally nothing of its purpose, even if only the saving (or spending) of money.

What is the broader purpose of the New York *system?* The state constitution mandates the following:

> . . . a system of free common schools, wherein all the children of this state may be educated. *N.Y. Const.*, Article XI, Education, § 1.

Other portions of the Education Code, for example those respecting compulsory attendance, flesh out the picture of legislative purpose. See e.g. § 3204, 3205. The most explicit expression of relevant legislative purpose may be § 3209:

> Public welfare officials . . . shall furnish indigent children with suitable . . . books . . . and other necessaries to enable them to attend upon instruction as hereinbefore required by law. (This section is noted here not for its creation of substantive rights but solely as an indication of legislative purpose in design of the system.)

The state courts have frequently interpreted the legislative purpose of these and related code sections. The opinion in *People v. Turner* is often cited:

> The object of a compulsory education law is to see that children are not left in ignorance, that from some source they will receive instruction that will fit them for their place in society. 277 App. Div. 317, 98 N.Y.S. 2d 886, 888 (1950).

In re Myers, 119 N.Y.S.2d 98 (1953), expanded upon the *Turner* language and applied it to a parent who wished to instruct his child at home. Because the mother was qualified and the child ". . . used the books designated for this grade by the Board of Education", the parent was held to be justified. The *purpose* of the legislative scheme was fulfilled.

What then is the relevant state purpose in the light of these provisions and decisions? Amici suggest the following formulation: ***The state's purpose is the maintenance of a system of education to which all children have functional access.***

Measured by this purpose the challenged practice is plainly self-defeating. It excludes from the central experience of the classroom all those who cannot purchase the key. New York has spent billions of dollars to provide a system of free common schools designed to instruct all children and then made certain that that system would fail for the plaintiff pupils. This is a classic example of irrationality.

Suppose, however, that the Court were to focus upon the preamble of §§ 701 et seq. as an expression of the legislative purpose. One would yet be left in impenetrable doubt, for the language of that preamble is extremely vague. While it would promote science etc., it suggests nothing inconsistent with the state constitutional norm of free public education for all. Quite to the contrary, it calls for "more adequate educational opportunities". In any event, these vague sentiments, whatever their tone, could scarcely be substituted for the historic constitutional and legislative objective we have identified. The only reasonable statement of relevant state purpose is that of providing an educational system truly accessible to all children. Again, and obviously, the state here has failed in that effort by effectively excluding plaintiff pupils.

There is, of course, the possibility argued by the state that the purpose of the discrimination here is simply to save money. There is nothing in the preamble of §§ 701 et seq. to suggest this, but amici are willing to assume it. It is, after all, but a truism; the state spends for so many purposes, and beyond that its purpose is not to spend. In any case the point is easily disposed of. This Court has declared the state's objective of economy an inadequate justification for an otherwise unsupportable classification. See e.g.

Graham v. Richardson, supra; Rinaldi v. Yeager, supra; Shapiro v. Thompson, supra.

But this is only the first reason for holding the wealth classification irrational. What is ultimately so exasperating is the pointlessness of this cruelty. Even if one conceded weight to the state's interest in saving resources, that interest becomes irrelevant here where any number of alternatives can be imagined which satisfy that end without singling out helpless children as victims.

In short, the second, equally cogent reason, is the "unnecessary" character of the discrimination. *Lindsey v. Normet, supra.* There exists a variety of methods assuring the state achievement of *all* its purposes without the present discrimination against petitioners by the wealth or choice of their parents.

In evaluating alternatives it should not be overlooked that New York's present assistance to school districts (especially poor districts) is all out of proportion to the cost here at issue. In 1969-70 New York contributed to local school districts more than $600 per pupil on a statewide average. See Report of the New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education; Volume 1, Chapter 2 (Albany, 1972). The point is that it is misleading to view the $7.50 here at issue apart from that subvention. New York could have the effect it wishes merely by miniscule budget shifts which are more general in their effect—that is which do not focus upon the poor. What New York in fact has done is to single out these plaintiffs to bear the full weight of its interest in economy. The poor have been selected to support the education of the nonpoor.

If the state still wished to permit charging a book fee, it could, as under the system before the court in *Chandler*, permit parents to submit a statement of inability to pay; *provided*, as in *Chandler*, that failure to do either led to sanctions only against the parents and not the students. If relieving poor parents from the payment were thought too costly, then perhaps a portion of the welfare budget could be diverted to the education budget. Finally, if necessary, the state might reorganize its education program so that it did not depend upon books. The range of alternatives open to the legislature emphasizes the very modest and limited character of the judicial intrusion here requested.

Conclusion.

Petitioner children have been unconstitutionally singled out and denied effective access to public education in New York. The denial of class books to children on whose behalf a fee has not been paid cannot be tolerated. Respondents' interest in saving money is simply insufficient; moreover, amici submit that to save money in this way is false economy of the worst sort. Not only are other public school resources devoted to bookless children substantially wasted; more importantly, the state seems embarked on a course in which it is squandering some of the most precious resources that it has, namely, these petitioner children.

Dated: May 5, 1972.

JOHN E. COONS,
STEPHEN D. SUGARMAN,
WILLIAM H. CLUNE III,
Attorneys and Amici Curiae.

MAY 25 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5685

DAISY JOHNSON, DOROTHY MILLER, FORESTINE PRESSY, individually, and on behalf of their minor children and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

NEW YORK STATE EDUCATION DEPARTMENT, EWALD B. NYQUIST, as Commissioner of the New York State Education Department, and the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead,

Defendants-Appellants.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ~~APPELLANTS~~ PETITIONERS

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Brown v. Board of Education, 347 U.S. 483 (1954) ..... *passim*

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Burns v. Ohio, 360 U.S. 252 (1959) 25

California Water Service Co. v. City of Redding, 304 U.S. 252 (1938) 44

Carrington v. Rash, 380 U.S. 89 (1965) 33

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Cooper v. Pate, 378 U.S. 546 (1964) 7

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Douglas v. California, 372 U.S. 353 (1963) 25

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Hosier v. Evans, 314 F. Supp 316 (D. Vir. Is. 1970) 14

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Loving v. Virginia, 388 U.S. 1 (1967) 19

Mayer v. Chicago, 404 U.S. 189 (1971) 29

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McGowan v. Maryland, 366 U.S. 420 (1961) 11

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NAACP v. Alabama, 357 U.S. 449 (1958) 19

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Rodriguez v. San Antonio Independent School District, 337 F. Supp. 280 (W.D.Texas 1970) 16

Rosado v. Wyman, 397 U.S. 397 (1970) 6

Rosado v. Wyman, 322 F. Supp. 1173 (E.D.N.Y. 1970) 6

Serrano v. Priest, 96 Cal. R'prtr. 601, 487 P. 2d 1241 (1971) 16

Shapiro v. Thompson, 394 U.S. 618 (1969) ..... *passim*

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Skinner v. State of Oklahoma, 316 U.S. 535 (1942) 38

Smith v. Bennett, 365 U.S. 708 (1961) 25
Smuck v. Hobson, 408 F. 2d 175 (D.C.Cir. 1969) 21
Schneider v. Rusk, 377 U.S. 163 (1964) 44
Snyder v. Commonwealth of Massachusetts, 291 U.S. 97 (1934) 37
Tate v. Short, 401 U.S. 395 (1971) 28
Tinker v. DesMoines Ind. Community School District, 393 U.S. 503 (1969) 37
United States v. Carolene Products, 304 U.S. 144 (1938) 20
Van Dusartz v. Hatfield, 334 F. Supp. 870 (D.Minn. 1971) 16
Williams v. Illinois, 399 U.S. 235 (1970) 28, 34
Williams v. Page, 309 F. Supp. 814 (N.D. Ill. 1970) reversed No. 18536 (7th Cir. 1971) [unreported], cert. den. 404 U.S. 1005 (1972) 46, 49
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Wisconsin v. Constantineau, 400 U.S. 433 (1971) 41

Constitutional Provisions:

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Federal Statutes:

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20 U.S.C. §§ 331-332 .....
20 U.S.C. §§ 401-602 .....
20 U.S.C. §§ 821-827 .....
20 U.S.C. §§ 861-870 .....
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New York Social Services Law §131-a 6

Regulation:

18 NYCRR §352.5(d) 6

Opinion:

Opinion No. 213 of the Counsel to the Education Department (July 6, 1967) 5

Other Authorities Cited:

Bloom, Stability and Change in Human Characteristics (1964) ..17, 36
Bloom, Davis, Hess, Compensatory Education for Cultural Deprivation (1965) 18
Burns, Childhood Poverty and the Children's Allowance, Children's Allowances and the Econimic Welfare of Children (1968) 22
Carlton, Economic Influences Upon Educational Progress in the United States (1908) 12, 13

Conant, Slums and Suburbs (1961) . . . . . .

Coons, Clune and Sugarman, Educational Opportunity: A Workable Constitutional Test for State Financial Structures, 57 Cal. L. Rev. 305 (1969) 15

Developments in the Law–Equal Protection, 82 Harv. L. Rev. 1065 (1969) 11

Discrimination Against the Poor, and the Fourteenth Amendment, 81 Harv. L.Rev. 435 (1967) . . . . . .

Harrington, The Other America (1966) 18

Kirp, The Poor, the Schools and Equal Education, 38 Harv. Ed. Rev. 635 (1968) . . . . . .

North, Economic Growth of the United States, 1790-1860 (1966) . . . . . .

Redlich, "Are there 'Certain Rights . . . Retained by the People'?" NYU L.Rev. 787 (1962) . . . . . .

Sexton, Education and Income (1961) . . . . . .

Tussman & tenBroek, The Equal Protection of the Laws, 37 Cal. L.Rev. 341 (1949) . . . . . .

U.S. Dept. of Health, Education and Welfare, Welfare Administration, Division of Research, Low Income Life Styles (1968) 2

U.S. Dept. of Health, Education and Welfare, Welfare Administration, Division of Research, Growing Up Poor (1966) . . . . . .

Wise, Rich Schools, Poor Schools: the Promise of Equal Educational Opportunity (1968) . . . . . .

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5685

DAISY JOHNSON, DOROTHY MILLER, FORESTINE PRESSY, individually, and on behalf of their minor children and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

NEW YORK STATE EDUCATION DEPARTMENT, EWALD B. NYQUIST, as Commissioner of the New York State Education Department, and the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead,

Defendants-Appellants.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLANTS

OPINION BELOW

The Opinion of the Court of Appeals (A-59-81)* is reported at 449 F.2d 871 (1971)

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*Numbers in parenthesis preceded by "A" refer to pages of the Appendix.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered August 13, 1971. The petition for a Writ of Certiorari was filed November 6, 1971 and was granted February 22, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

New York Education Law § 701 in pertinent part, provides:

> "2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.
>
> 3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be

textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustee or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

* * * * *

New York Education Law § 703 provides in pertinent part:

"1. The qualified voters of any school district present at any annual school meeting or at any special school meeting duly and legally called for that purpose, shall have power, by a majority vote, to be ascertained by taking and recording the ayes and noes, to vote a tax for the purchase of all text-books used, or to be used, by pupils enrolled in grades one to six, inclusive, in the schools of the district.

2. If such tax shall be voted, it shall be the duty of the board of education or trustees of such district, within ninety days thereafter, to purchase and furnish free, text-books to all the pupils in grades one through six inclusive attending the schools in such district. [Notwithstanding the provisions of subdivision one of this section, where the qualified voters have failed, neglected or refused to authorize free distribution of textbooks, the board of education or trustees of the district may, within its discretion, purchase textbooks and either rent or sell the same to pupils in grades one through six, inclusive, attending the schools in such district]** Such board of education or trustees shall have power to establish such rules and regulations concerning the use by the pupils of such text-books, and the care, preservation and custody thereof as it shall deem necessary."

**Matter in brackets [ ] was approved and became effective June 22, 1971, Laws of 1971, ch. 699.

QUESTIONS PRESENTED

(1) May New York State constitutionally deny indigent children textbooks essential for required instruction solely because of their inability to pay rental fees?

(2) Have petitioners raised a substantial constitutional claim requiring that a three judge court be convened?

STATEMENT OF THE CASE

A. The Legislative History of Statutory Provisions

Prior to 1965, the New York legislative scheme for distributing textbooks provided that they were to be distributed free to children in all grades of public schools only when authorized by the voters of the district. [Laws 1947, c. 820].

In 1965, the New York State Legislature amended Section 701 of the Education Law [Laws 1965, c. 320] to require local public school authorities to purchase and loan textbooks free of charge to all pupils in grades 7-12 in public and private schools. No similar mandatory provision was established for the distribution of textbooks free of charge to children in grades one through six. Instead, § 703 of the Education Law was amended [Laws 1965, c. 320] to authorize the qualified voters of local school districts to vote a tax for the purchase of textbooks, and if voted, requires the local school board to purchase and furnish textbooks free to all pupils in grades one through six attending the schools in said districts.[1]

[1] The complete scheme for distributing textbooks includes provisions for the distribution of textbooks to pupils attending schools in city school districts. As to school districts in cities of less than 125,000 population, §2503 (7) of the Education Law provides that Boards of Education *may*, without authorization by the voters, provide textbooks to children attending school in the district. As to school districts in cities of over 125,000 population, §2554 (7) of the Education Law provides that Boards of Education of a city which provided free textbooks to pupils prior to June, 1917, must continue to supply them free. In the case of school districts which did not make such a provision in 1917, the authority to provide free textbooks is discretionary.

Where the voters fail to approve a proposed tax to finance school operations, the Board may, nevertheless, levy a tax on the property owners living within the school district but only for such amounts as are necessary for "ordinary contingent expenses" of such school district.[2]

B. The Ultimate Facts

The Board of Education of Union Free School District No. 27, Town of Hempstead, following rejection of the 1970-71, 1971-72 school budgets by the voters of the district, furnished textbooks free to all children in grades seven through twelve as is required by New York Education Law § 701. Children in grades one through six, however, regardless of the economic status of their family, were required to pay a fee to obtain textbooks.[3]

Appellants are recipients of public assistance and the parents of a total of 6 children in public school grades 1-6. They were unable to pay the rental fees for textbooks, which ranged from $6.00 to $58.50 per household and their children, and all other children too poor to pay the rental fees, were denied textbooks which are recognized by the state to be essential to obtaining an adequate public education. Books were provided only to those children in grades 1-6 whose parents could afford the rental fees.[4] (A-38).

---

[2]The Board concluded on the basis of Opinion Number 213 of the Counsel to the Education Department, dated July 6, 1967, that textbooks may not be provided free of charge to pupils in grades 1-6 when the voters have failed to approve a school district budget, inasmuch as textbooks are not considered to be "ordinary contingent expense" items within the meaning of § 2023 of the Education Law. (A-38).

[3]Because no budget was approved, the school board charged for various other services and supplies. Appellants were required to pay transportation costs for their children. In addition, charges were made for certain other supplies, e.g., workbooks, duplicating paper, materials, etc. (A-22).

[4]There is no dispute concerning appellants' inability to pay the fees. Prior to July, 1969, New York met educational expenses for AFDC children ages 6 through 11 in two ways. The sum of $1.00

C. The History of These Proceedings

On September 16, 1970, this class action was commenced in the United States District Court for the Eastern District of New York. Appellants sought both injunctive and declaratory relief. The constitutionality of the legislative scheme was subjected to a threefold challenge. The third cause of action claimed, in essence, that New York had denied indigent children textbooks essential for their required instruction solely because of their poverty, in violation of the Fourteenth Amendment (A-12). Appellants also alleged that textbooks can be obtained for children in grades 1-6 only upon payment of a fee [$7.50 per pupil]; that plaintiffs are indigent and cannot pay a fee; that by reason of plaintiffs' poverty their children are deprived of the equal protection of the law and deprived of equal educational opportunity; and that poor children denied textbooks receive an education inferior to those children learning with books, resulting in widespread feelings of inferiority and unfitness. (A-13)[5]

---

each month was included in the basic needs grant. In addition, 18 NYCRR §352.5 (d) permitted special needs grants for such items as transportation, lunches, activity fees, gymnasium clothing, locker fees and textbooks, upon demonstration of a particular need. With the enactment of 131-a of the New York Social Services Law, [Laws 1969, c. 184] effective July 1, 1969, New York eliminated all special grants and substituted a system of flat grants to cover all items of basic sustenance, exclusive of rent and fuel which were added to the recipient's allowance on a separate basis. See *Rosado v. Wyman*, 397 U.S. 397 (1970). On remand, the Court in *Rosado v. Wyman*, 322 F. Supp. 1173 (E.D.N.Y. 1970) determined that approximately $3.00 is included in the monthly grant of a family of four for all educational expenses. Effective July 1, 1971, New York Social Services Law §131-a was amended [Laws 1971, c. 133] and New York enacted a ten percent reduction in the level of benefits. New York State now pays ninety percent of the standard of need of families with dependent children.

[5]The children, forced to attend classes without textbooks, were subjected to intolerable and harsh pressures, e.g., (a) being told that "he will receive an 'F' for each day he is without the required textbooks", (b) "when other pupils in class read from textbooks, the teacher doesn't let him share a book, instead she gives him paper and

The appellee, New York State Education Department, did not controvert any of appellants' allegations and filed no pleadings or affidavits in District Court.[6]

Appellee school district, in its answering papers filed in the District Court, actually supported the substantiality of the claim when it admitted:

> "That the denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks." (A-35)

The District Court [Travia, J.] without holding an evidentiary hearing, denied appellants' application for the convening of a three judge court to hear the controversy, their application for preliminary injunctive relief, and dismissed the complaint. (A-58). The opinion failed to discuss appellants' claim that the challenged scheme denies indigent children the equal protection of the laws. (A-42-46).

The Court of Appeals for the Second Circuit by judgment entered August 13, 1971, affirmed. The majority conceded education to be an area of fundamental importance, and agreed that appellants had realistically described the deprivation visited upon poor children. (A-62).

The majority court held, however, that the legislative scheme did not invidiously discriminate against indigent children. Judge Moore, writing for the majority, reasoned:

> ". . . those who can afford textbooks will also no doubt receive a better education than those who

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tells him to 'draw'," (c) a six year old child being told by her teacher, "no money, no books." (A-28)

[6]The New York State Department of Education apparently conceded the factual allegations made by plaintiffs. On a motion to dismiss, the well-pleaded allegations of the complaint and affidavit must be taken as true. See, e.g., *Gardner v. Toilet Goods Association*, 387 U.S. 167, 172 (1967); *Cooper v. Pate*, 378 U.S. 546 (1964).

cannot but that is because they had the financial means to supplement that which the State provides and not because the State has provided them with more than has been provided plaintiffs." [ft. omit.] (A-73).

Judge Kaufman, dissenting, found that the State had handicapped indigent children by denying them textbooks provided to others who can afford them and that the fee requirements effectively bar indigent children from receiving an adequate education. (A-80).

SUMMARY OF ARGUMENT

The challenged legislative scheme for distributing textbooks to grades 1-6 of New York's public schools must be measured by the most exacting equal protection standard because the legislation burdens both a "fundamental" interest, education, and discriminates on the basis of economic status, a suspect and traditionally disfavored criteria. In order to justify the classification, the State bears the heavy burden of demonstrating a compelling interest which is served by the challenged legislation and cannot be satisfied by less burdensome means.

Education qualifies as a "fundamental" interest because of its long history of public esteem and its profound and measurable impact upon an individual's life chances for economic and social advancement. Education provides the very tools necessary to exercise those basic rights which are vital to the maintenance and preservation of our democratic society. The classic expression of the significance of education to the individual and society can be found in *Brown v. Board of Education*, 347 U.S. 483, where it was recognized as basic to the functioning of a free society. Textbooks are an indispensable part of public education and often serve as the entire curricula for children in the primary grades.

The State has denied equal protection of the laws by dividing public school children in grades 1-6 into two classes,

poor and non-poor, extending the full benefits of public education to those who can pay the textbook rental fees, but withholding the benefits of the State's educational program from those who cannot. The classification on the basis of wealth penalizes children, a discrete and insular minority, not because of any conduct of their own, but because of their status as members of poor families. Financial barriers which preclude indigents from exercising their fundamental rights were held violative of the Equal Protection Clause in cases involving the right to vote and cases involving the right to appeal from criminal convictions. The principle developed in *Griffin v. Illinois*, 351 U.S. 12 and its progeny applies to the equally important right to public education.

The State has also denied due process of law to poor children. The Fourteenth Amendment, in guaranteeing due process to all, protects a sphere of personal liberties so rooted in the tradition and conscience of our people that they rank as fundamental. The right to acquire knowledge has been held to be within the ambit of this sphere of protected personal liberties. *Meyer v. State of Nebraska*, 262 U.S. 390.

Education is assigned no lower a place on our society's hierarchy of fundamental values than is marriage or divorce. The public schools, like the courts, remain under the State's exclusive control. The rationale expressed in *Boddie v. Connecticut*, 401 U.S. 371, should be applied to fees which effectively bar indigent children from obtaining an adequate public education.

There can be no justification for this violation of fundamental constitutional principles. The various interests proffered by the State fail to justify the challenged classification. By denying textbooks only to poor children in grades 1-6, New York does not realize its goal of providing books to as many children as possible. Neither is the deprivation of books in the primary grades rationally related to the State's desire to foster the study of specific subjects in secondary

school. Additionally, there are several alternative and less restrictive means available to New York to achieve the governmental objective, means which do not burden fundamental rights.

The Court of Appeals erroneously affirmed the lower court's denial of the application for the convening of a three judge court to hear the controversy by employing an improper and unduly restrictive standard in conflict with the provisions of 28 U.S.C. §2281 and the guidelines established in *Ex Parte Poresky*, 290 U.S. 30. The Court, having acknowledged the existence of a legitimate controversy and the absence of direct precedent on the constitutional claim presented, should have refrained from assessing the ultimate merits of the claim and, instead, remanded the case to the District Court so that a three judge panel could be convened to hear the controversy.

POINT I

APPELLANTS' CHILDREN WERE DENIED EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT WHEN THEY WERE DENIED TEXTBOOKS ESSENTIAL TO THEIR PUBLIC SCHOOL EDUCATION SOLELY BECAUSE OF THEIR POVERTY.

A. The Statutory Scheme for the Distribution of Textbooks Divides Children into Two Classes and Denies Equal Public Education to Children in Grades 1-6 Solely on Account of their Poverty.

Appellants' basic contention is that the New York statutory scheme for distributing textbooks to public school children in grades 1-6 violates the Equal Protection Clause. The challenged scheme divides children attending public schools into two classes and, without any compelling state interest, burdens the fundamental right of poor children in grades 1-6 to equality of educational opportunity solely on account of their poverty by depriving them of textbooks

hich are both required and essential to their education. he classification frustrates the attainment of the central urpose of compulsory education in New York State, amely, the education of all children of the state.

In New York State, under the challenged statutory scheme, extbooks must be loaned free of charge to all pupils in ublic and private schools in grades 7-12. Textbooks ay be loaned free of charge to public school children grades 1-6 only where the voters of the district have pproved a tax for that purpose. In the absence of voter pproval the school board may levy a tax for ordinary con- ngent expenses but not for textbooks. (A-38). To obtain extbooks in the absence of voter approval, public school hildren in grades 1-6 must pay textbook rental fees. The ppellants, receiving public assistance from the Nassau ounty Department of Social Services, were unable to pay ie textbook rental fees which ranged from $6.00 to $58.50. heir children were compelled to suffer educational depri- ation by attending school without those textbooks which re required for their instruction and suffer emotional and sychological harm as a result of sitting side by side with ore affluent children learning with textbooks. The legis- tive scheme creates two classes of children, not physically eparate, yet unequal—the poor suffer while the rich receive ie full benefits of the State's educational program.

B. The Equal Protection Clause Requires that the Burdening of a Fundamental Interest Be Justified by a Standard of Compelling Interest.

In considering laws challenged under the Equal Protection lause, this Court has evolved more than one test, depending pon the interest affected and the classification involved.[7]

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[7]See, *Note Developments in the Law - Equal Protection*, 82. Harv. . Rev. 1065 (1969). Compare, e.g., *Shapiro v. Thompson*, 394 U.S. 18 (1969) and *Kramer v. Union* Free School District, 395 U.S. 621 1969), classification must be justified by compelling state interest with *IcGowan v. Maryland*, 366 U.S. 420 (1961) and *Williamson v. Lee* ptical of Oklahoma, Inc., 348 U.S. 483 (1950) classification must e rationally related to legitimate state interest.

In the present case whether we look to the interest affected [equal educational opportunity] or the basis for the classification [limited fiscal resources coupled with the State's desire to foster study in certain subjects], the challenged legislative scheme must be measured by the more exacting equal protection standard because the classification burdens the entitlement of poor children in grades 1-6 of the public schools to equal educational opportunity. Appellants' right to the most searching judicial protection is based upon the fundamental importance of education, that education is preservative of other basic civil and political rights; the politically impotent class subjected to the deprivation; and the discrimination by the State against children in the offering of public education based on their poverty.

1. Education is a Fundamental Interest and the *Sine Qua Non* of Useful Existence

"Americans regard the public school as a most vital civic institution for the preservation of a democratic system of government." *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963).

The creation and development of the tax supported public school system permits little doubt that Americans "have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create." *Board of Education v. Allen*, 392 U.S. 236, 247 (1968).

The "free school system" is perhaps the most characteristic institution in America. The early architects of universal schooling viewed the concept of public education as the bulwark of the republic.[8] Education has historically

[8]The American concept of free public school education available to all children can be traced to the establishment of the North American colonies. The first compulsory education law was passed in the Massachusetts Bay Colony in 1642 and the first public school system was created in Massachusetts in 1647. See, Carlton, *Economic Influence Upon Educational Progress in the United States* (1908)

been viewed by the courts as "one of the purposes for which what is called the police power may be exercised" and has been recognized as "one of the first objects of public care." *Interstate Consolidated Street Railway Co. v. Massachusetts*, 207 U.S. 79 (1907).

Early advocates of universal education advanced three arguments in support of free public schools.[9] First, and foremost, that it was necessary for the political safety and well-being of the State; second, that education promoted the elimination of such social evils as crime and pauperism; and third, that education promoted the economic well-being of the individual and prevented class differentiation. Education has long been regarded the prime factor in upward social and economic mobility. A major promise of our society, born of a literal belief in the equality of mankind, was the attempt to make education and schools the chief agent of social mobility, a means of self-improvement available to all.[10] The American people value education, not only as a reflection of itself, but as

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p. 9. The public school system in this country finally took root in the 1820's and 1830's, under the impetus of Jacksonian democracy. By 1820, New York, New England and most of the middle Atlantic states had a tax supported public school system, see, North, *Economic Growth of the United States*, 1790-1860 (1966) p. 174, By 1860 the majority of states established a public school system and more than half of the nation's children were receiving the *benefits* of education. See Wise Rich Schools, Poor Schools: *The Promise of Equal Educational Opportunity*, (1968) pp. 112-113.

[9]Governor Clinton, in his opening address to the New York Legislature, said in 1827: "The great bulwark of the republican form of government is the cultivation of education for the right of the suffrage cannot be exercised in a Salutory manner without intelligence." Carlton, *Economic Influences Upon Educational Progress in the United States* (1908) p. 51.

[10]Horace Mann, a commanding figure in the public school movement considered education beyond all other devices of human origin, as the great equalizer of the conditions of man - the balance-wheel of the social machinery. See Kirp, *The Poor, the Schools and Equal Education*, 38 Harv. Ed. Rev. 635 (1968).

a developer of society in all its cultural and social aspects. The pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable, as was recognized by this Court in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), when it stated:[11]

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Education is essential to democracy so much so that it has been characterized by one Court as "an aspect of twentieth century life so fundamental as to be fittingly considered the cornerstone of a vibrant and viable republican form of democracy. . ." *Hosier v. Evans*, 314 F. Supp. 316, 319 [D. Vir. Is. 1970]. The importance the State places upon education is attested to by the fact that in New York [N.Y. Education Law § 3205(1)], as in all but three states, education is made compulsory for a minimum of

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[11]The enactment by Congress of laws providing funding for education programs also attest to its significance. See, e.g., Elementary and Secondary Education Act of 1965, 20 U.S.C. §§234-244, 331-332, 821-827, 861-870, 881-885; Johnson-O'Malley Act, 25 U.S.C. §§452 454; National Defense Education Act of 1958, 20 U.S.C. §§401-602.

ten years.[12] While voting is of such importance that it is accorded special protective status as a right, education is considered of such fundamental importance to society that the State has rendered education a duty, imposed by reason of the State's police power, to prepare citizens for full participation in society.[13]

It is implicit in the history and character of American public education that the public schools, which are supported almost entirely in most communities by public funds, serve a uniquely public function: the training of American citizens so that they may assimilate a heritage common to all American groups. Attendance at public schools is not compulsory; parents remain constitutionally free to satisfy the compulsory education requirements by enrolling their children in private schools. See, *Meyer v. Nebraska*, 262 U.S. 390 (1923). To poverty stricken parents, the alternative between the public school system and private school system is illusory. The children of the poor are, in actuality, not only compelled to attend school for ten years, but must be dependent upon the public school system for their education.[14] The public school system, therefore, has enormous influence upon the personal develment and the minds of children.

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[12]The compulsory character of education is not unlike the compulsory character of criminal process. Although the individual's interest in freedom is unique from a larger perspective, education may have far greater social significance upon liberty than a free transcript or court appointed lawyer. Education, in addition, affects a vastly greater number of persons than the criminal law. Education also has an inverse relation on the rate of crime.

[13]See Coons, Clune and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal. L. Rev. 305 (1969).

[14]In this context, it has been suggested that "a child of the poor assigned willy-nilly to an inferior school takes on the complexion of prisoner, complete with a minimum sentence of twelve years." Coons, Clune and Sugarman, *supra*, 57 Cal. L. Rev. at 388.

entrusted to it.[15] The methods and curricula are not chosen by the parent but by the State:

> "[T]he influence of the school is not confined to how well it can teach the disadvantaged child; it also has a significant role to play in shaping the student's emotional and psychological make-up." *Hobson v. Hansen*, 269 F. Supp. 401, 483 [D.D.C. 1967].

The importance of education was recognized by the Court below when it characterized it as "an area of fundamental importance." (A-72). Other courts, both federal and state, have also considered education as an area of fundamental importance.[16]

Textbooks are the heart of the public school system. In New York State, as in most other public school systems, textbooks are at the core of the curricula[17] and are essential, critical and an indispensable part of the teaching process. "Books are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit." *Board of Education v. Allen, supra*, 392 U.S. at 252 [Dissenting opinion, Jus-

[15]The classroom is peculiarly the "market place of ideas". *Keyishan v. Board of Regents*, 385 U.S. 589 (1967).

[16]In *Serrano v. Priest*, 96 Cal. R'ptr. 601; 487 P. 2d 1241, 1244 (1971) in a suit challenging the inequality of the local property tax scheme for financing public education, the Court, in declaring the law unconstitutional, stated that: "the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth. . . ." The *Serrano* rationale was followed by the New Jersey Superior Court in *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A. 2d 187 (1972). Several recent federal courts have struck down state methods of financing public education as unconstitutional, applying a more exacting standard because of the fundamental interest involved. See, e.g., *Van Dusartz v. Hatfield*, 334 F. Supp. 870 [D. Minn. 1971], and *Rodriguez v. San Antonio Independent School District* 337 F. Supp. 280 [W.D. Texas, 1971].

[17]New York Education Law § 701 (2) defines textbooks as a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.

tice Black]. "No educational program can exist without books. . . A curriculum cannot survive without books."[18]

Judge Kaufman, dissenting in the Court below, stated: "Curricula not keyed to textbooks are advocated by some educators and have been put into practice in some private and public schools. But defendants do not dispute that New York's own public education system continues to rely extensively on the traditional method of teaching from texts. Children without the benefit of these texts, one must imagine and as affidavits before us aver, are afforded a markedly inferior education during their early years of schooling than are their non-indigent peers." (A-79).

Textbooks in the primary grades serve as the major structure for the entire curriculum. Children in the elementary school grades are learning to read, often they are unable to leave their textbooks and utilize outside resources and references found in libraries. In the first three grades, learning to read is perhaps the major occupation of the pupil. Beginning in about grade 4, reading becomes a tool for learning. Consequently, pupils who have not sufficiently mastered reading skills have ever-increasing difficulties with textbooks in different subject areas.[19] The early years of education are particularly critical to the learning process. Benjamin S. Bloom, Professor of Education at the University of Chicago, concluded that 30 percent of the development of general intelligence takes place between ages 4 and 8, and that 50 percent of vocabulary development at grade 12 [age 18] has been reached by the end of grade 3.[20]

[18]Affidavit of Dr. Gerald G. Glass, Professor of Education and Director of the Reading and Study Center and Graduate Program in Reading at Adelphi University, New York, September 24, 1970, presented by plaintiffs in the District Court. (A-31).

[19]James B. Conant, *Slums and Suburbs* [McGraw-Hill Book Compay, Inc. 1961], p. 57.

[20]Benjamin S. Bloom, *Stability and Change in Human Characteristics* [John Wiley and Sons, Inc. 1964] pp. 88-89, 127. Bloom's study concludes that there is plasticity in the intelligence of children and that marked change in the environment of early years can produce greater changes than equally marked changes in later years.

Children from the lower socio-economic class have demonstrated a greater need for reading skills. Within a few years, the child from the deprived background is retarded in basic reading skills. The reading retardation in early years prevents the pupil in later years from moving up into higher paying positions. Thus, reading disability tends to perpetuate the poor child's social class. Reading is the basic learning skill from which almost all academic learning is founded and is an indispensable requirement for upward movement through social classes.[21] Poor children deprived of textbooks in public schools are further handicapped by the lack of educational stimulus in the home. The handicap includes the lack of books and emphasis on reading in the home.[22] While the State has not controverted plaintiffs' contention that textbooks are a critical and an inseparable part of education, the local school board in the District Court admitted that, "textbooks . . . are essential to a quality educational program and a necessary and fundamentally basic tool in the education of youngsters." (A-40).

2. Education is Preservative of All Other Fundamental Basic Civil and Political Rights

Education is further recognized as important, not only in its own right, but because it is preservative of all other fundamental rights. Education provides the tools necessary to exercise every right considered vital to the maintenance of democratic institutions. While the right of suffrage is guaranteed by the Constitution, this Court has held that a

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[21] Benjamin Bloom, Allison Davis, Robert Hess - *Compensatory Education for Cultural Deprivation* [Holt, Rinehart & Winston, Inc. 1965].

[22] Patricia Cayo Sexton, *Education and Income* [The Viking Press, Inc. 1961]. The failure to develop reading skills locks the poor child into his socio-economic class and effectively ends the American Dream. The incidence of school dropout is three times higher among poor children; See, too, Michael Harrington, *The Other America*, pp. 182-183. (1966)

State may require literacy as a prerequisite to voting.[23] In *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 52 (1959), this Court stated:

> "Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. [citation omitted]. It was said last century in Massachusetts that a literacy test was designed to insure an independent and intelligent exercise of the right of suffrage."

"[E]ducation underlies the whole substance of political process and is antecedent to voting in the orders of both time and cause. All political behavior inevitably must reflect the presence or absence and the quality of education. A man's understanding of public issues is a function of those communications which are intelligible to him."[24] Education is essential for the enjoyment of the following rights which this Court has already characterized as fundamental: voting [*Harper v. Virginia State Board of Elections*, 383 U.S. 663]; free speech [*Lovell v. City of Griffin*, 303 U.S. 444]; association [*NAACP v. Alabama*, 357 U.S. 449]; marriage [*Loving v. Virginia*, 388 U.S. 1]; travel [*Shapiro v. Thompson*, 394 U.S. 618]; divorce [*Boddie v. Connecticut*, 401 U.S. 371]; privacy [*Griswold v. Connecticut*, 381 U.S. 479].

Education bears directly on the ability of the individual to exercise all of the foregoing rights and the ability to participate meaningfully in the life of the community. As Judge Kaufman, dissenting, correctly observed:

> "The ideal of education in our society is to free men and women to pursue their own lives more fully. Economic and social mobility, cultural richness

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[23]In New York State eligibility to vote is dependent upon ability to read and write English. N.Y. Election Law §150.

[24]Coons, Clune and Sugarman, *supra*, 57 Cal. L.Rev. 305, 368.

and diversity, the inheritance of arts, skills, thoughts and values, the strong and flexible operation of democratic political processes, the growth and function of private institutions and associations, the habits, structures, virtues and idiosyncracies that make our society unique and coherent take root in formal and informal education." (A-77).

3. Those Subject to the Deprivation Created by the Statutory Scheme Comprise a Politically Impotent Class Requiring this Court's Special Protection

Legislation with respect to public education, like that dealing with welfare, deals with a critical aspect of the personal lives of citizens. Its importance is magnified by the defenseless and disadvantaged state of the class of citizen involved, poor children, who are less able than others to enforce their rights. As this Court has recognized:

> "Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products*, 304 U.S. 144, 153, fn. 4 (1938).[25]

A class comprising children of parents too poor to pay textbook rental fees which range from $6.00 - $58.50 per household, comprising the poorest of the poor, public assistance recipients, clearly qualifies as such a discrete and insular minority.

> "More than any other segment of society, the very lowest economic stratum is socially isolated. The poor man not only fails to comprehend society or his community, he is out of touch with it. He reads fewer newspapers, hears fewer news programs, joins fewer organizations, and knows less of the

[25] In *Graham v. Richardson*, 403 U.S. 365, 372 (1971), the Court cited aliens as a prime example of a discrete and insular minority for whom heightened judicial solicitude is appropriate.

> current life of either the community or the larger world than more prosperous, better educated people do." U.S. Dept. of Health, Education and Welfare, Welfare Administration, Division of Research, *Low-Income Life Styles* (1968) pp. 4-5.

As Michael Harrington concluded in his classic study, *The Other America*, (1966) p. 13,[26] "The poor are politically invisible." Within the class of the poor the welfare poor are, if anything, even more isolated from the social and political life of the large community than are the poor as a whole:

> "[T]here are important differences between the very poor who manage to maintain themselves without public assistance and those who do not have the resources to achieve even a minimum level of economic independence. For example, negative public attitudes towards mothers who are dependent on AFDC tend to transfer to the mothers and their children, with an associated sense of failure, strong self-disparagement and hopelessness." U.S. Dept. of Health, Education and Welfare, Welfare Administration, Division of Research, *Growing up Poor*, (1966) p. 7.

And the most powerless of the poor, lacking even theoretical access to the political process through the franchise, are the children whose education is here at issue:

> "[O]f all groups among the poor it is children who have been most neglected and most shabbily treated by current social policies, despite the fact

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[26] "[T]he poor and racial minorities . . . are not always assured a full and fair hearing through the ordinary political processes, not so much because of the chance of outright bias, but because of the abiding danger that the power structure may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary. *Hobson v. Hansen*, 269 F. Supp. 401, 507-08 (D.D.C. 1967), aff'd. sub nom, *Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir. 1969).

that of all population groups they are the most vulnerable." Burns, Childhood Poverty and the Children's Allowance, in *Children's Allowances and the Economic Welfare of Children* [Burns, ed. 1968] p. 3.

4. The Statutory Scheme Creates Classification of Children Based on Conduct of Their Parents Over Which They Have No Control

The effect of the challenged scheme is to penalize children, not because of any conduct of their own, but because of their status as members of poor families. Classification embodying discrimination based on personal characteristics over which an individual has no control—such as race,[27] alienage,[28] indigence,[29] illegitimacy,[30]—have been regarded by this Court as inherently suspect and as calling forth "the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

In the context of the statutory right to recover for the wrongful death of a parent, this Court has concluded that "it is invidious to discriminate against [illegitimate children] when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done the mother." *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) [footnotes omitted]. The same rationale must apply to the statutory right to receive a public education. It is invidious to discriminate against certain innocent children "when no action, conduct or demeanor of theirs is possibly relevant" to their educational needs.

Because this Court is here concerned with a fundamental interest, high on our society's hierarchy of values, and the

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[27] e.g. *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Brown v. Board of Education*, 347 U.S. 483 (1954).

[28] e.g., *Oyama v. California*, 332 U.S. 633 (1948)

[29] e.g. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

[30] e.g. *Levy v. Louisiana*, 391 U.S. 68 (1968).

children involved are being burdened for reasons of poverty over which they have no control, and inasmuch as children are politically the most impotent members of our society, the educational disadvantage and unequal education that the local school board admits result from the imposition of textbook rental fees must be subjected to the most searching judicial scrutiny possible. Such an inquiry, even in light of the proffered justification for the classification, must inevitably lead to the conclusion that appellants and the class they represent are being denied the equal protection of the laws.

C. The Equal Protection Clause Forbids Economic Discrimination in the Enjoyment of Fundamental Interests.

The Fourteenth Amendment to the United States Constitution requires the States to extend equal protection of the laws to all citizens. Tussman and tenBroek, discussing the Equal Protection Clause, wrote of the Fourteenth Amendment:

> "We now know that the equal protection clause was designed to impose upon the states a positive duty to supply protection to all persons in the enjoyment of their natural and inalienable rights—especially, life, liberty and property—and to do so equally. We also know that the equal protection clause, the only clause of section one of the Fourteenth Amendment that added new language to the Constitution, was originally regarded as the most basic and sweeping of the three. . . ."[31]

The Equal Protection Clause has been applied to economic discrimination, and its effect has been to render the "mere state of being without funds. . .a neutral fact—constitutionally an irrelevance, like race, creed or color." *Edwards v. California*, 314 U.S. 160, 184-185 (1941) [Jackson, J. concurring]. Thus, income and ability to pay

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[31] *The Equal Protection of the Laws*, 37 Cal. L.Rev. 341 (1949).

appear to be joining race as a suspect criteria and when serving as the basis for discrimination, render government action vulnerable to attack on Fourteenth Amendment grounds. Financial barriers may not be imposed by the State to deny indigent citizens the equal protection of fundamental rights.[32]

The starting point for consideration of invidious discrimination against the poor, and the equal protection clause, is *Griffin v. Illinois*, 351 U.S. 12 (1956). The question before the Court was whether Illinois, consistent with the Due Process Clause, could deny adequate appellate review to the poor while granting the review to others. The State had conceded that transcripts were necessary for adequate appellate review of trial errors. The Court found the classification on the basis of poverty discriminatory and stated:

> "It is true that a State is not required by the Federal Constitution to provide . . . appellate review at all. [Citations omitted]. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." 351 U.S. at 18.

Poverty bears no relationship to the goals of criminal justice. The Court stated:

> "There can be no equal justice where the kind of a trial a man gets depends upon the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[33] 351 U.S. at 19.

[32] Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 Harv. L.Rev. 435 (1967).

[33] The Court, having found that petitioners' constitutional rights were violated, refrained from dictating how the state might satisfy those rights and stated: "We do not hold, however, that Illinois must purchase a stenographer's transcripts in every case where a defendant cannot buy it . . . We are confident that the state will provide corrective rules to meet the problem which the case lays bare." 351 U.S. at 20.

The *Griffin* case was followed by a series of decisions which both reaffirmed and amplified its basic principles.[34]

In *Douglas v. California*, 372 U.S. 353 (1963) this Court considered the impact of poverty on the state guaranteed appellate review of a criminal conviction. Under the challenged California law, those who could afford counsel had received a full hearing automatically; those who could not afford counsel had been provided free counsel only if, after examination of the trial record, the appellate court concluded that counsel would be of particular value to the defendant. The Court found that the failure to provide counsel resulted in an impermissible classification between rich and poor, and stated:

> ". . . . [T]he rich man can require the Court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment." 372 U.S. at 357-358.

There is a striking parallel between the pivotal facts in *Griffin* and the case before the Court. In both cases, the challenged statute offers all persons the right to receive some benefit—right to appeal or the right to an education. In both cases, the enjoyment of the benefit is conditioned upon the payment of a fee. In *Griffin*, the State conceded that trial transcripts were necessary for adequate appellate review. Here, the State has not controverted appellants' allegations that textbooks are indispensable to the education of their children and the local school board has, in fact, admitted that "textbooks are essential to a quality educational program and a necessary and fundamentally basic tool in the education of youngsters." (A-40).

[34]See, e.g. *Eskridge v. Washington State Board of Prison T. & P.*, 357 U.S. 214 (1958), [*Griffin* applied retroactively]; *Burns v. Ohio*, 360 U.S. 252 (1959) filing fees for appeal; *Smith v. Bennett*, 365 U.S. 708 (1961) filing fees for habeas corpus; *Lane v. Brown*, 372 U.S. 477 (1963) free transcript required in coram nobis proceeding; *Long v. District Court of Iowa*, 385 U.S. 192 (1966), free transcript required for habeas corpus.

In *Griffin*, all convicted defendants had a right to appeal, but the inability of indigent defendants to pay a fee deprived them of the opportunity for adequate appellate review. In New York all children in grades 1-6 have the right to an education, but those too poor to pay the textbook rental fees which are a prerequisite to the distribution of textbooks, are, in the words of the local school board:

> "[U]nder an educational disadvantage and denie(d) . . . an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks." (A-41).

The Court's observation in *Griffin* that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color," *supra*, 351 U.S. at 17, applies with equal force to the fundamentally important institution of public education. In both cases, indigents are denied access to their rights solely because of their inability to pay the fees. Just as no rational relationship existed in *Griffin* between the ability to pay a fee and the guilt or innocence of the defendant, here too, no rational relationship exists between a child's need for a public school education and the affluence of his parents.

The Court focused on the impact of fees upon ability of the poor to exercise fundamental rights in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966). The Court, in declaring a $1.50 poll tax imposed by the State as a prerequisite to voting unconstitutional, stated:

> "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. . . . [W]ealth or fee paying has, in our view, no relation to voting qual-

> ifications; the right to vote is too precious, too fundamental to be burdened or conditioned."[35]

In ruling the economic discrimination of the poll tax violative of the Equal Protection Clause, this Court focused on the impact of the legislation on the right of the poor to exercise their franchise. The Court recognized voting as preservative of other basic civil and political rights. 383 U.S. at 667. The Court found that the economic discrimination kept poor people with an important stake in the political process from the ballot. Here the rental fee keeps poor children with an important stake in the system of public education from receiving a quality education provided to their more affluent classmates. Education is no less preservative of basic civil and political rights than is the ballot. Education and literacy often are the precondition to the exercise of the ballot. See, *Lassiter v. Northampton Election Board*, 360 U.S. 45 (1959).

The foregoing cases cannot be distinguished on the basis that they relate only to basic federal constitutional rights as was argued by the State in the Court below. In *Harper*, the Court did not decide whether the right to vote in a state election is conferred by the federal constitution; instead, the holding rests upon the principle:

> "... once the franchise is granted to the electorate lines may not be drawn which are inconsistent with the Equal Protection Amendment." 383 U.S. at 665.

Neither *Griffin* nor *Douglas* involve a basic federal constitutional right; in each case the state has conferred a right to appellate review. The holdings stand for the principle that once a state has granted a right or benefit the Equal Pro-

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[35] In *McDonald v. Board of Elections Comm.* 394 U.S. 802 (1969), while the Court rejected a constitutional challenge to the absentee voting statute brought by inmates of a county jail, it reaffirmed the principle of Harper and stated: "[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race." 394 U.S. at 807.

tection Clause protects defendants from invidious discrimination on account of their poverty.

As Judge Kaufman, in the Court below, observed, "It will not do to say, as does the majority, that in this case 'public funds are distributed equally'." (A-81). In *Griffin*, *Douglas*, and *Harper*, the statute found constitutionally impermissible did not expressly discriminate against indigents as a class. Instead, in each case payment of a fee was the prerequisite to securing a transcript, a lawyer and a ballot. The Court in each case held the impact of the requirement was no different than if the poor had been expressly excluded.

Here, the statutory scheme for providing textbooks, although non-discriminatory on its face, is grossly discriminatory in its operation. In *Williams v. Illinois*, 399 U.S. 235 (1970), the Court held that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine.[36] The Court considered, and rejected, the State's argument that the law was non-discriminatory on its face, found that the statute worked an invidious discrimination, and stated:

> "On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who by definition, is without funds." 399 U.S. at 242.

Here, as in *Williams*, the statute although non-discriminatory on its face, is in operation discriminatory. While the statute extends to all children an apparently equal opportunity to obtain textbooks by payment of rental fees, such

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[36] In *Tate v. Short*, 401 U.S. 395, (1971), the Court held it was a denial of equal protection to limit punishment of a crime to those who are able to pay it but to convert the fine to imprisonment for those who are unable to pay it.

choice is an illusory one for indigent children who are without funds.

Recently, in *Mayer v. Chicago*, 404 U.S. 189 (1971) this Court declined to re-examine *Griffin* and upheld the right of indigents to trial transcript in non-felony cases where punishment was fine rather than confinement. Contentions of the City that *Griffin* and its progeny are confined to cases where the indigent is subject to confinement, and that the interest of the indigent was outweighed by the State's fiscal and other interests in not burdening its appellate process, was expressly rejected by the Court:

> "*Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way."

The opportunity of education "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Board of Education, supra,* 347 U.S. at 493. New York State, by discriminating against poor children in grades 1-6 solely on account of their poverty, has breached that guarantee of "equal educational opportunity without the vestige of invidious discrimination."

D. The Proffered State Interests Fail to Justify the Denials of Equal Educational Opportunity.

To fulfill the constitutional command that "no state . . . shall deny to any person within its jurisdiction the equal protection of the laws," a state-imposed classification, at the very *minimum*, must be rationally related to the attainment of a legitimate governmental objective. *Gulf, Colorado and Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 (1897). However, laws which are based upon suspect criteria such as race or wealth, or burden the exercise or enjoyment of a fundamental right or interest, are unconstitutional unless

the State can demonstrate that such laws are "*necessary* to promote a *compelling* governmental interest."[37] *Shapiro v. Thompson, supra*, 394 U.S. at 634. [Emphasis added]; *Kramer v. Union Free School District, supra*, 395 U.S. at 627. As this Court recognized in *Dunn v. Blumstein*, 92 S. Ct. 995, 1003 (1972):

> "[L]egal 'tests' do not have the precision of mathematical formulas. The key words [necessary to promote a compelling governmental interest] emphasize a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes."

The District Court dismissed the complaint without benefit of an evidentiary hearing, or answer and affidavits by the State and concluded that the legislature had three objectives in enacting the statutory scheme: (a) a legitimate interest in conserving fiscal resources; (b) a legitimate interest in providing textbooks to as many children as possible, and (c) a desire to foster study in certain subjects. (A-54-55). The District Court opinion conspicuously avoids any discussion of what Judge Kaufman, in his dissenting opinion in the Court below, characterized as the essence of plaintiffs' case, "discrimination between poor children in elementary schools without textbooks and their more affluent classmates who can afford texts." (A-74). The majority in the Court below approved the District Court's application of the compelling interest standard and concluded that "the legislative scheme is reasonable; it is buttressed by compelling state justifications and is not tainted with the slightest hint of invidious discrimination." (A-67).

It is not sufficient to merely show that the statute which burdens a fundamental interest furthers a substantial state interest, for a state may not choose means which unnecessarily burden a fundamental right. Statutes affecting funda-

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[37]See, Note, *Developments in the Law: Equal Protection*, 82 Harv. L. Rev. 1065 (1969).

mental interests must be drawn with "precision", *NAACP v. Button*, 371 U.S. 419, 438 (1963), and must be "tailored" to serve their legitimate objectives. *Shapiro v. Thompson, supra*, 394 U.S. at 631. The State has failed to show that this classification which burdens the right of poor children is more than just one of several reasonable ways of achieving its goals.

"[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." *Dunn v. Blumstein, supra*, 92 S. Ct. at 1003. Thus, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that burden fundamental interests when the end can be achieved through less onerous alternatives.[38] The review for less restrictive alternatives to achieve a valid governmental objective must be a searching one. *Shapiro v. Thompson, supra*, 394 U.S. at 633-8; *Kramer v. Union Free School District, supra*, 395 U.S. at 632.

In *Shelton v. Tucker*, 364 U.S. 479, 488 (1960), this Court said:

> "The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose."

Appellants will now turn to consideration seriatim of the State's justification for denying textbooks to indigent children in grades 1-6.

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[38] The principle of the least onerous alternative has been applied to public education. See, e.g., *Blocker v. Board of Education*, 226 F. Supp. 208, 223, 229 [E.D.N.Y. 1964].

1. *The desire to provide textbooks to as many children as possible.*

If, indeed, the statutory scheme is intended to enable as many children as possible to have textbooks, the District Court erroneously failed to consider other less onerous alternatives for achieving this legitimate goal.[39] Without additional expenditures, New York State could avoid the invidious discrimination by providing free textbooks in grades 1-12 to *only* those children in financial need. By providing free textbooks to only those children who are unable to pay the textbook rental fees, the articulated State goal of assuring that as many children as possible have textbooks will be realized, while preserving the limited resources available.

Another less restrictive alternative which the District Court failed to consider, and which was pointed out by plaintiffs in the Court of Appeals, was that the New York Education Law § 2023 could be amended to include textbooks for children in grades 1-6 in the definition of "ordinary and contingent expenses" so that a local school district could nevertheless levy a tax for textbooks even in the absence of voter approval.

Appellants contend that a close scrutiny of the proffered reasons for the classification fail to satisfy either the "traditional" equal protection standard or the "more stringent standard" applied where fundamental interests, such as education, are burdened.

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[39]The District Court, in a less than searching analysis of alternatives, concluded that there were only four choices available to the Legislature, 1) make no contribution for purchase of textbooks for any children, 2) contribute to purchase of textbooks to be loaned free to all children in grades 1-12, 3) contribute to purchase of textbooks to be loaned free to all children in grades 1-12, but limit amount to be spent, 4) contribute to the purchase of textbooks to be loaned free to some children and amend §703 to provide for the others. (A-54).

2. *The Denial of Textbooks to Indigent Children in Grades 1-6 Conserves Fiscal Resources.*

This Court has recognized that in cases where a fundamental interest is burdened by the challenged classification, it is not sufficient to merely ask whether the policy adopted is "rational", for it is always rational to practice public parsimony. Attempts by states to justify the conditioning of fundamental rights or the enjoyment of fundamental interests on the basis of their need to conserve resources has been rejected by this Court. In *Shapiro v. Thompson, supra,* 394 U.S. at 633, this Court in dictum, stated:

> "[A] State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. . . . The saving of . . . costs cannot justify an otherwise invidious discrimination:"

This Court rejected the fiscal resource argument proffered by Arizona in a recent equal protection case involving a denial of welfare benefits to aliens. See, *Graham v. Richardson, supra,* 403 U.S. at 374.

In *Bullock v. Carter*, 92 S. Ct. 849, 858-859 (1972), the Court rejected the State's argument that filing fees in primary elections were fiscally necessary:

> "Without making light of the State's interest in husbanding its revenues, we fail to see such an element of necessity in the State's present means of financing primaries as to justify the resulting incursion on the prerogative of voters."

The State may not, because of its desire to conserve fiscal resources, or some more remote administrative benefit, burden a citizen's fundamental interests. *Carrington v. Rash*, 380 U.S. 89, 96 (1965). So too, the State may not deprive

indigent children of the tools essential for their education by consideration of minimum financial expediency.

The District Court, in upholding the limited fiscal resources justification, stated:

> "The Legislature may justify its failure to [provide textbooks free of charge to all children in grades 1-12] on the basis of its legitimate interest in conserving the State's fiscal resources, providing that choice does not result in any invidious discrimination.... [S]ince this Court cannot compel the State to expend any funds, much less additional funds for textbooks, this Court cannot fault the Legislature's failure to choose the second alternative." (A-54)

The District Court improperly proscribed its analysis by excluding any alternative to the invidious classification which required the expenditure of funds. In *Griffin* and its progeny, however, this Court required the states to provide services wrongfully denied citizens solely because of their poverty. Implementation of these decisions necessarily required increased expenditures. "[N]ew cases expose old infirmities which apathy or absence of challenge have permitted to stand. But the Constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of status quo." *Williams v. Illinois, supra*, 399 U.S. at 245.

Maximizing the impact of limited funds so that as many children as possible receive textbooks in New York State is a formidable sounding state interest. Such interest is a legitimate and compelling government goal. However, it is impossible to see how the challenged scheme for distributing textbooks is necessary to fulfill the pertinent State objective. The desire to provide books to as many children as possible hardly justifies denying textbooks to indigent children in grades 1-6 while making them available to non-poor children in the same grades, and by providing textbooks to all children in grades 7-12 irrespective of their financial need. To make textbooks available to as many children as possible, New York State simply has to pro-

vide free textbooks to those children who are unable to pay the required fees. Objective criteria to establish need can easily be formulated and implemented without imposing an excessive administrative burden.

3. *The Denial of Textbooks to Indigent Children in Grades 1-6 Fosters the Study of Certain Subjects in Grades 7-12.*

"In construing legislation, it is fundamental that [the Court] must not be guided by a single sentence or member of a sentence but [should] look to the whole law, and its objects or policy." *Richards v. United States*, 369 U.S. 1, 11 (1961). Both Courts below upheld the denial of textbooks to indigent children in grades 1-6 by finding the compelling "interest standard" satisfied by reason of the Legislature's policy statement that textbooks were provided free of charge to pupils in grades 7-12 to increase the proficiency of students in science, mathematics and foreign languages. (A-69).

A careful reading of the policy statement which accompanied the passage of § 701 by the New York Legislature does not support the interpretation given to it by the lower courts. The Legislature, in its "statement of policy" to the Act [Laws of 1965, c. 320 § 1] speaks of aiding "non-sectarian subjects" and gives as examples, "science, mathematics (and) foreign languages." The policy statement was clearly intended to limit public aid to parochial schools to non-sectarian textbooks and thereby avoid a conflict with the First Amendment.[40] The desire of the Legislature as reflected in its policy statement "for more adequate educational opportunities and increased efforts to educate more of the talent of our nation . . ." bears no rational relationship to the denial of textbooks to poor children in grades 1-6.

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[40]See, dissenting opinion of Justice Douglas in *Board of Education v. Allen*, supra, 392 U.S. at 255-256, for a full discussion of the legislative policy statement.

The State has not controverted plaintiffs' proof that textbooks are more critical to education in grades 1-6 than 7-12. The evidence presented to the District Court establishes that textbooks provide the entire curriculum for children in grades 1-6 who are still "learning to read" and have not developed the ability of "reading to learn" which high school students are capable of doing. Students deprived of textbooks in grades 1-6 will not have the basic skills necessary to become proficient in elementary school, much less in high school.[41]

There is no rational relationship between the State's objective of fostering the study of certain subjects in secondary school and maximizing the impact of contributions for textbooks, with the burdening of the right of indigent elementary school children to acquire knowledge. In *Meyer v. State of Nebraska*, 262 U.S. 390, 403, the Court, in *dicta*, observed: "It is well known that proficiency in a foreign language seldom comes to one not instructed in a foreign language at an early age. . . ." Children deprived of textbooks in the years of greatest development of intelligence will seldom become proficient in studies in their secondary grades.

The importance of textbooks to children in their formative years of schooling cannot be overemphasized, for the deprivation of textbooks in elementary grades will permanently retard reading skills; without these basic skills, enriched curriculum on a secondary level will be of dubious value. Textbooks distributed to children at grade 7 who have been deprived of these basic tools in elementary school and the needed foundation to learning is useless, for they have already been programmed by the state for failure throughout their school career.[42] The challenged statute

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[41] See, Affidavit of Dr. Gerald G. Glass, Professor of Education at Adelphi University, Garden City, New York, filed in the District Court. (A-31).

[42] Benjamin S. Bloom, *Stability and Change in Human Characteristics* [John Wiley and Sons, Inc. 1964] p. 127.

does not accomplish the articulated State purpose with sufficient precision. *Kramer v. Union Free School District, supra*, 395 U.S. at 632. The classification is destructive of the State goal of providing "more adequate educational opportunity" and the denial of textbooks to indigent children does not further the State's constitutional mandate to provide for the maintenance and support of a system of free common schools "wherein all the children of [the] State may be educated." New York State Constitution, Article XI, §1.

POINT II

INDIGENT CHILDREN DENIED TEXTBOOKS BY THE STATUTORY SCHEME ARE DEPRIVED OF THEIR RIGHT TO ACQUIRE KNOWLEDGE WITHOUT DUE PROCESS OF LAW.

The Due Process Clause of the Fourteenth Amendment protects all citizens, students included, against the State and all its creatures–boards of education not excepted. *Barnette v. West Virginia Board of Education*, 319 U.S. 624, 637 (1943); *Tinker v. DesMoines Independent Community School District*, 393 U.S. 503, 511 (1969).

This Court has written that the Fourteenth Amendment establishes a sphere of personal liberty for every individual and protects those personal liberties so rooted in the tradition and conscience of our people that they rank as fundamental. *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934). The sphere of fundamental rights protected by the "liberty" assurance includes, but is not restricted to, the specific terms of the Bill of Rights.[43] Freedom of speech and of the press are prime examples of those personal rights and liberties protected by the Due Process Clause.

[43]See, e.g., *Griswold v. State of Connecticut*, 381 U.S. 479, 484 (1965), where the Court held the right of marital privacy to be within the protective penumbra of the specific guarantees of the Bill of Rights and therefore protected by the Due Process Clause.

The language and history of the Ninth Amendment supports this Court's conclusion in *Griswold v. Connecticut*, *supra*, 381 U.S. at 488, that there are additional fundamental rights which exist alongside those expressly mentioned in the first eight constitutional amendments.[44] See, *Redlich, "Are there 'Certain Rights . . . Retained by the People'?"*, 37 N.Y.U.L. Rev. 787, 804-812 (1962).

Due Process has never been defined with any precision, but through the decisions of this Court "it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual has struck between that liberty and the demands of organized society." The liberty guaranteed by the Due Process Clause "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U.S. 497, 542, 543 (1961) (dissenting opinion, Harlan, J.); see, *Skinner v. State of Oklahoma*, 316 U.S. 535 (1942).

Education is valued as a major determinant of an individual's chances for economic and social success in our society. The respect which the American people hold for education is deeprooted and the acquisition of knowledge has long been regarded as a matter of fundamental importance.[45] The significance of education was perhaps best expressed in *Brown v. Board of Education*, *supra*, 347 U.S. at 493, which stated, "In these days it is doubtful if any child

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[44] In *Kent v. Dulles*, 357 U.S. 116, 125 (1958), and *Shapiro v. Thompson*, 394 U.S. 618, 629-631 (1969), the right to travel was held to be a fundamental right protected by the "liberty" assurance of the Due Process Clause.

[45] In the Northwest Ordinance of 1787, Congress declared: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

may reasonably be expected to succeed in life if he is denied the opportunity of an education." Public education supports each and every other value of our society.

In *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925), the Court struck down a law which compelled attendance of all children in public schools, holding that it conflicted with the "liberty of parents and guardians to direct the upbringing and education of children under their control."

In *Meyer v. State of Nebraska*, 262 U.S. 390 (1923), the Court held that a law which prohibited the teaching of a foreign language to children in elementary schools deprived the children of their right to acquire knowledge without due process; the Court, holding that the State may not, consistent with the Fourteenth Amendment, contract the spectrum of available knowledge, stated:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed . . . without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual . . . to acquire useful knowledge . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." 262 U.S. at 399.

While recognizing the interest of the State in improving the quality of its citizens, the Court concluded that it may not do so by burdening the pupil's basic right to the acquisition of knowledge.

In this case, just as in *Meyer*, the State has burdened the right of indigent children to acquire knowledge without any rational, much less compelling, governmental objective. The deprivation in *Meyer* involved the right to acquire knowledge in a single subject, whereas in this case, indigent children in grades 1-6 who are denied textbooks are in actuality deprived of the curriculum for every subject.

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court held that indigents barred from obtaining divorces

because they were unable to pay court costs and fees averaging $60 were deprived of due process of law. The Court considered the interests affected–the basic position of the marriage relationship in our society's hierarchy of values and the State's exclusive control of the machinery for the dissolution of the marriage relationship, and concluded:

> "[A] State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve the legal relationship without affording all citizens access to the means it has prescribed for doing so."[46] 401 U.S. at 383.

The *Boddie* decision is grounded upon the importance of the marriage relationship on the nation's traditional scale of values and the State's monopolization of the means for legally dissolving that relationship. The *Boddie* rationale is applicable to this case. Here the interest of indigent children to acquire knowledge and obtain an adequate public education is nó less important to our society than is dissolution of marriage relationships. In *Boddie*, the State was in exclusive control of the machinery to dissolve the relationship. The same can be said for public education. New York State has arrogated to itself responsibility for administering and enforcing a formal system of education. It does so by compelling attendance of all children between the ages of 6-16 for required instruction. It must be assumed that New York considers textbooks to be of positive value to the education of children in grades 1-6 since their use is required by state law.[47] The local school board has admitted that "textbooks . . . are essential to a quality educational program and a necessary and basic tool in the education of youngsters." New York is in the anomalous position of withholding only from poor children what it acknow-

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[46] In separate concurring opinions, Justices Douglas and Brennan concluded that the case should have been decided on the basis of the Equal Protection Clause and the line of cases marked by *Griffin v. Illinois*, 351 U.S. 12 (1956).

[47] See, § 701(2) of the New York Education Law.

ledges to be essential for the education of all children. Education for only the wealthy is an elitest concept alien to our democratic heritage and contrary to the tradition of public education.

A statute may be constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of a police power is beyond question. *Boddie v. Connecticut, supra,* 401 U.S. at 379. The *Boddie* Court, on the basis of the *Griffin* rationale, considered and rejected the State's argument that the costs and fees were justified as a mechanism of resource allocation or cost recoupment. The fiscal resources argument is not sufficient to override the right of the indigents to full access to interests of fundamental importance.

In *Brown v. Board of Education, supra*, 347 U.S. at 494, the Court found that the denial of equal educational opportunity on the basis of race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The majority in the Court below recognized that the challenged legislative scheme "engenders a widespread feeling of inferiority and unfitness in poor children and is psychologically, emotionally and educationally disastrous to their wellbeing." (A-62). Requirements of due process prohibit state stigmatization and imposition of badges of disgrace upon innocent children. *C.f. Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

In *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) the Court, in holding that segregation in the public schools deprived Negro children of due process of law, considered the psychological burden and feeling of inferiority generated by segregated education and concluded that the restriction on the liberty of children [to equality education] was not reasonably related to any valid governmental objective. The Court stated:

> "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

In sum, the legislative scheme creates two classes of children, not physically separate as in *Brown* and *Bolling*, but certainly unequal. New York, on the basis of wealth–which like race is a traditionally suspect criteria–has discriminated against the right of appellants' children to acquire knowledge and receive public education equal to those of their classmates wealthy enough to obtain textbooks from the State. Here the rich receive the full benefits of a public school education, while the poor are denied equality of educational opportunity. New York has failed to justify this psychological stigmatization and educational handicapping of indigent school children.[48]

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[48]In *James v. Valtierra*, 402 U.S. 137, 145 (1971), Justice Marshal, in a dissenting opinion joined by Justices Brennan and Blackmun, wrote: "It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect."

POINT III

THE COURT BELOW ERRONEOUSLY FOUND THE CONSTITUTIONAL QUESTION INSUBSTANTIAL BY APPLYING AN UNDULY RESTRICTIVE STANDARD IN CONFLICT WITH THE GUIDELINES ESTABLISHED BY THIS COURT.

The Court below affirmed the District Court's denial of appellants' application for the convening of a three judge court pursuant to the requirements of 28 U.S.C. §2281.[49]

The District Court's decision cited no precedent for its refusal to convene a three judge court to hear appellants' claim. One surmises that the Court evaluated appellants' claim on the merits and, finding it insufficient as a matter of law, used this finding as a basis for its decision on the three judge court.[50]

The precise guidelines to be followed by a district court in deciding a motion to convene a three judge court have

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[49] §2281 provides:

> "Injunction against enforcement of State statutes; three judge court required:
> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this Title."

[50] Judge Travia's opinion does not make it clear as to whether he found plaintiffs' claim to be "wholly insubstantial" or merely lacking in sufficient merit to ultimately prevail. The distinction is not unimportant. If the single judge employed the latter standard, as it appears that Judge Travia did from his lengthy consideration of many balancing and counterbalancing factors, then he is, in fact, performing and usurping the function of the three-judge court to decide after a full hearing upon the merits of the cause presented.

been clearly delineated by this Court in *Idlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U.S. 713, 715 (1962), when it stated:

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

In weighing these questions, the district court judge must convene a three judge panel unless the constitutional claim against statewide regulations is "obviously without merit," *Ex Parte Poresky,* 290 U.S. 30, 31-32 (1933), or "because its unsoundness so clearly results from the previous decision of this Court as to foreclose the subject." *California Water Service Co. v. City of Redding,* 304 U.S. 252, 255, (1938); see *Schneider v. Rusk,* 377 U.S. 163 (1964).

A. The Court below applied a standard in conflict with an unbroken line of decisions of this Court.

In its analysis of appellants' constitutional claim, the Court below recognized that appellants had realistically described the plight of their children when they stated:

> "Indigent children sitting bookless, side by side in the same classroom with other more wealthy children learning with purchase[d] textbooks engenders a widespread feeling of inferiority and unfitness in poor children and is psychologically, emotionally, and educationally disastrous to their well-being." (A-62).

The majority, in assessing this deprivation, seemingly acknowledged the substantiality of petitioners' claim that the challenged statutory scheme effectively denied equal protec-

tion of the laws to indigent children unable to obtain required textbooks because they lacked the prerequisite fees. It appeared to be troubled by its burden of determining "what is substantial" and concluded that in the final analysis only this Court could make that determination. Faced with an equal protection challenge in the area of education and presented with constitutional questions which have not been foreclosed by earlier decisions of the Supreme Court, the Court of Appeals proceeded to obscure the clear guidelines established by this Court in *Idlewild, Poresky* and *California Water Service Co.*, and adopted a new and unduly restrictive standard: whether the constitutional claim "might" be foreclosed by earlier decisions of this Court.

The standard of review actually used by the Court below was an assessment of the case upon the merits, requiring a three judge court to determine the controversy only if the statute was likely to be held unconstitutional, i.e., no existing precedent which "might" foreclose the subject. No authority by this Court exists for this narrow interpretation of 28 U.S.C. §2281. What precedent there is requires that the claim's unsoundness be clear and beyond doubt if a three judge court is to be denied. Otherwise, the statutory panel must be convened. Under the erroneous standard applied, and contrary to the express rulings of the Court, the possibility of ultimate defeat on the merits was found to be sufficient reason to deny the convening of the three judge court, rather than the certainty of being foreclosed.

The reasoning of the majority in using the restrictive standard of "possibility of loss" was twofold. First, it was said that fewer judges and fewer "indiscriminate three judge appeals" would be involved, a projection accurately labeled by Judge Kaufman in his dissenting opinion as amounting "at best to a self-fulfilling prophesy."[51] (A-75). See *Har-*

[51] Judge Kaufman, in his dissenting opinion (A-75) correctly observed that the convening of the three judge court in the first instance, because it bypasses the normal appellate level, will involve fewer judges in the ultimate disposition of the case, as has been amply demonstrated by the procedural history of this case.

grave v. McKinney, 413 F. 2d 320 (5th Cir. 1969).[52] Secondly, the majority contended that any harm to petitioners in an erroneous denial of the direct Supreme Court Appeal from a three judge court can be remedied by certiorari review, as herein sought. See *Miller v. New York Stock Exchange*, 425 F. 2d 1074 (2nd Cir. 1970), *cert. den.* 398 U.S. 905 (1970). But, of course, if the claim is in fact "substantial", then certiorari is an extremely lengthy process by which to determine the constitutional question, far lengthier than the convening of the three judge court in the first instance. The Court below, having acknowledged that "those who can afford textbooks will also no doubt receive a better education than those who cannot" (A-73) should have remanded immediately without attempting to assess the ultimate outcome of the case. Judge Kaufman, dissenting, properly concluded that the "substantial claim" test may well produce the "most efficient operation of the three judge court scheme as presently constituted," and that in any event, "judges should not in their frustration yield to the temptation to legislate their own solutions .... especially, as here, when the judicial statutory amendment is as likely to increase burdens and delays as to alleviate pressures." (A-76).

The standard applied by the Court below is in conflict with that applied by the Fifth, Sixth and Seventh circuits.[53] In

[52] The *Hargrave* case clearly demonstrates the waste of judicial time which results from the refusal of a district court to convene a three judge court in the first instance. In Hargrave, the Fifth Circuit reversed the lower court and ruled that a three judge court must be convened to consider the constitutionality of a Florida public school financing statute under an equal protection challenge. On remand, a three judge court held the statute unconstitutional. *Hargrave v. Kirk*, 313 F. Supp. 944. (1970) On appeal, this Court vacated the district court decision on other grounds, but indicated on remand that the lower court should thoroughly explore the equal protection issue. *Askew v. Hargrave*, 401 U.S. 476 (1971).

[53] See, too, *Rodriguez v. Brown*, 437 F.2d 34 (5th Cir. 1971); *Protestants and Other Americans United for Separation of Church and State v. United States*, 435 F. 2d 627 (6th Cir. 1970); *Hargrave v. McKinney*, 413 F.2d 320 (5th Cir. 1969); *Williams v. Page*, 309 F. Supp. 814, rev'd. No. 18536 (7th Cir. 1971) [unreported] cert. den. 404 U.S. 1005 (1971).

Jackson v. Choate, 404 F. 2d 910, 913 (5th Cir. 1968), the Court held that a three judge court must be convened to pass on the merits of the claim unless it is an "open and shut case." The Court stated:

> "In this day and time of dynamic expansion of constitutional principles and their application to new and sometimes unheard of situations it takes judicial prescience of a Delphic order to say with certainty that the attack is insubstantial. It is the better course —certainly from an administrative standpoint—to forego the doubts, constitute a 3-Judge Court, and allow that court to determine initially this and the other issues."

Furthermore, the standard applied by the Court below is in conflict with the Second Circuit opinion in *McMillan v. Board of Education,*[54] 430 F.2d 1145, (2d Cir. 1970), a case also involving a Fourteenth Amendment challenge to the distribution of educational benefits. The Court recognized that the constitutional question in this area of law remains unresolved and stated:

> "In stating these questions, we are not suggesting that they will necessarily be resolved in plaintiffs' favor. The state may well be able to develop sufficient reasons to justify what it has done. We hold merely that the claims were sufficiently substantial to deserve exploration, possibly after the taking of evidence, before a court of three judges. This is a developing area of application of the equal protection clause [ft. omit] and questions should not be deemed unsubstantial merely because they might have been so considered twenty years ago when the right-privilege distinction was more highly regarded than it is today." *Id.* at 1150.

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[54] *McMillan* held that a three judge court was required to consider plaintiffs' claim that they were denied the equal protection of the law because their poverty would not permit them to take advantage of the state's offer to pay $2,000 for the tuition at special private schools for handicapped children [which was only available if they could pay the difference between the stipend and full tuition].

This Court has clearly defined substantiality for the purpose of convening a three judge court in *Ex Parte Poresky, supra,* 290 U.S. 30, 32 (1933):

> "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint. [cit. omit] The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' "

The narrow question for determination in the courts below was whether plaintiffs' claim is "obviously without merit." 290 U.S. at 32.

The lower courts lengthy and intricate balancing of legislative factors [many of which were not substantiated by evidence in the record] is, in fact, more than a recognition of a legitimate controversy raised by appellants. It constitutes a clear admission that a substantial claim had been raised which then required the court's positing of countervailing factors. Having acknowledged the existence of the legitimate controversy, the lower court's proper role was to immediately convene a three judge court, irrespective of the court's own lingering doubts as to the ultimate outcome of the case on the merits. See *Hargrave v. McKinney,* 413 F.2d 320, 324, 328 (5th Cir. 1969).

The majority's conclusion that the claim presented in this case is not substantial is inconsistent with its admission that education is an area of fundamental importance and its recognition that binding precedent requires states to demonstrate the existence of a compelling state interest in order to justify conditioning the exercise of fundamental rights or the enjoyment of fundamental privileges upon the payment of money. The holding is properly questionable in light of the admissions by the local school board that:

"textbooks for all pupils are essential to a quality educational program and a fundamental tool in the education of youngsters." (A-40)

and

"That the denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks." (A-41)

B. The Court Below Erroneously Applied this Court's Ruling in Dandridge v. Williams, 397 U.S. 471, in Rejecting Appellants' Equal Protection Claim.

As was recognized by the Court in *McMillan v. Board of Education, supra*, 430 F.2d at 1150 (2d Cir. 1970), the application of the equal protection clause to the area of education is a "developing area" of law. This is evidenced by recent litigation which challenged the validity of conditioning public education upon the payment of fees.[55]

The Court below erroneously concluded that the constitutional claim had been rendered insubstantial by this

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[55]In *Chandler v. South Bend Community School Corporation*, CA. No. 71S51 (N.D. Ind. August 26, 1971), the Court issued a permanent injunction restraining a school board from suspending children whose parents failed to pay textbook fees or execute "inability (to pay) forms." The Court reasoned that the right to receive an education is a personal fundamental right belonging to the student and that any state interference with that right required a substantial burden of justification. The Court concluded that the suspension of the students because of the failure of their parents to pay the required fees denied them equal protection of the law; in *Williams v. Page*, 309 F. Supp. 814, rev'd. No. 18536 (7th Cir. 1971) (unreported), *cert. den.* 404 U.S. 1005 (1971) poor children were denied participation in school sponsored or sanctioned extra graduation activities solely because they were unable to pay the required fees. The District Court found the classification to be due to the disparity of wealth in our society and not to the deliberate attempt by the State to set one group apart [as did the majority in the instant case] and dismissed the complaint. The Court of Appeals, finding the constitutional claim to be substantial, reversed and remanded the case to the District Court.

Court's holding in *Dandridge v. Williams*, 397 U.S. 471 (1970). *Dandridge* involved a dilution of welfare benefits whereas in the instant case the denial of textbooks, which appellees have conceded are "necessary" and "essential to a quality education program," effectively bars appellants' children from receiving an adequate public education. In *Dandridge*, this Court found the challenged regulation free from invidious discrimination and rationally supportable on at least four grounds. Here there has been no showing to justify the deprivation, as we have demonstrated in our previous argument.

More importantly, however, the classification in this case, unlike *Dandridge*, burdens public education, a fundamental interest, and the constitutionally protected right to acquire knowledge.[56] See, *Meyer v. Nebraska, supra*, 262 U.S. at 390. In addition, classifications based on wealth are traditionally suspect and disfavored criteria by this Court. *Harper v. Virginia Board of Elections*, 383 U.S. 663. In *Shapiro v. Thompson*, 394 U.S. 618, the Court, in dictum, indicated that certain wealth discrimination in the area of education would be unconstitutional and that a state could not, for example, "reduce expenditures for education by barring indigent children." Judge Kaufman, dissenting in the Court below, recognized the actuality of the deprivation when he stated:

> "The fees required by New York here as a prerequisite to the distribution of textbooks, according to evidence presently in the record, range from $6.00 to $58.50 per household, and effectively bar plaintiff's children from receiving an adequate public education." (A-80).

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[56] The majority opinion in *Dandridge*, 397 U.S. at 484, cites *Shelton v. Tucker*, 364 U.S. 479 (1960) as the examplar of the Court's special commitment to a special view of equal protection in those areas where "freedoms guaranteed by the Bill of Rights" may be affected. In *Shelton*, Mr. Justice Stewart, for the majority had declared that "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools." 364 U.S. at 487.

Recently, in *Graham v. Richardson, supra,* 91 S.Ct. at 1854 (1971), this Court declined to rely on the holding of *Dandridge* in a case involving denial of welfare benefits to aliens. The Court stated:

> "The classification involved in the instant cases, on the other hand, are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired. Appellants' attempted reliance on *Dandridge v. Williams* [citations omitted] is also misplaced, since the classification involved in that case [family size] neither impinged upon a fundamental constitutional right nor employed an inherently suspect criterion."[57]

The Court below, in extending the holding of *Dandridge* to justify the conditioning of a fundamental interest upon the payment of a fee, necessarily had to disregard the unbroken line of decisions by this Court expressly rejecting such classifications. It rejected the precedental value of *Boddie v. Connecticut,* 401 U.S. 371, and *Griffin v. Illinois,* 351 U.S. 12, as due process cases. The Court rejected the relevancy of the holdings in *Shapiro v. Thompson,* 394 U.S. 618, and *Harper v. Virginia Board of Elections,* 383 U.S. 663, which both affected fundamental interests, concluding that the "compelling state interest" theory is inapplicable to education.

As we have argued in the previous points, a proper interpretation of *Griffin, Harper,* and *Boddie* requires the con-

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[57] The analysis of the Court below was less than searching and was without benefit of a developed trial record. While the appropriate standard to be applied is the compelling interest standard, it is clear that not even the *Dandridge* standard was satisfied. There was no rational basis upon which to conclude that the denial of textbooks to children in elementary school will foster the study of science, mathematics and foreign languages in secondary school. It also strains rationality to conclude that the state's interest in conserving fiscal resources if furthered by a scheme that distributes textbooks to children in grades 7-12, irrespective of their financial need, while denying textbooks to children in grades 1-6 too poor to pay rental fees.

clusion that their rationale is applicable to classifications which deprive children of an adequate public education solely because of their poverty. At a minimum, the only conclusion the Court of Appeals could have reached on the claim presented was that the constitutional challenge was still an open question.

While the requirements of three judge courts may entail a serious drain upon the federal judicial system which Congress may choose to rectify in the future, the problems will not be resolved by federal courts refusing to hear substantial constitutional claims.

CONCLUSION

The Court should hold that New York State may not, consistent with the obligations imposed upon it by the equal protection and due process clauses of the Fourteenth Amendment, deny indigent children attending public school textbooks essential for their required instruction solely because of their inability to pay rental fees. The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5685

DAISY JOHNSON, ET AL., *PETITIONERS*

—v.—

NEW YORK STATE EDUCATION DEPARTMENT, *ET AL.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ~~APPELLEE~~ RESPONDENT BOARD OF EDUCATION, UNION FREE SCHOOL DISTRICT No. 27, TOWN OF HEMPSTEAD

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Opinion:

Opinion No. 213, (1967), of Counsel,
New York State Education Department,
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BRIEF OF APPELLEE BOARD OF EDUCATION, UNION FREE SCHOOL DISTRICT No. 27, TOWN OF HEMPSTEAD

Introduction

This is an action commenced by three parents individually and on behalf of their minor children who attend the schools operated by the appellee Board of Education, Union Free School District No. 27, Town of Hempstead, Nassau County, New York, commonly known as the West Hempstead Public Schools. Appellants appeal from a decision of the Court of Appeals reported at 449 F2d 871 (1971) affirming the decision and order of the District Court reported at 319 F. Supp. 271 (1970) which denied the convening of a three judge District Court and dismissed the complaint.

The action centers an attack upon New York Education Law §701 and §703 [McKinney's Consol. Laws, 1971]. The former, in substance, authorizes a board of education to loan textbooks without charge to children enrolled in grades seven to twelve. No similar provision exists for children enrolled in grades one through six. The latter section in substance, authorizes a board of education to furnish free textbooks to pupils in grades one through six only upon the voting of a tax therefore by the qualified voters of the school district.

The First Cause of Action claims that §701 invidiously discriminates by creating an arbitrary and discriminatory classification which deprives plaintiffs and members of their class of equal protection of the law and an adequate education. The Second Cause of Action alleges that §701 and §703 impose a majority vote approval of a tax assessment to enable children in grades one to six to receive free textbooks and that this constitutes a denial of equal protection. A Third Cause of Action states that pursuant to §701 and §703, textbooks can be obtained in grades one to six only upon the payment of a rental fee [$7.50 per pupil]; that plaintiffs are indigent and cannot pay a fee; and that by reason of their poverty their children are deprived of equal educational opportunity.

The only claim now argued in this Court relates to the Third Cause of Action. Essentially, appellants urge here that §701 discriminates against indigents and that this raises a substantial constitutional question which requires that a three judge court be convened. For the reasons hereinafter set forth, this claim should be rejected.

It should also be expressly noted at this point, that the West Hempstead Public Schools, effective July 1, 1972, no longer has been operating under an austerity or contingency budget. A proposed budget for the forth-

coming school year was approved by the qualified voters on May 3, 1972. Textbooks are being furnished free to all students regardless of thier grade level.

Statement

On separate occasions in 1970 and 1971 the qualified voters of Union Free School District No. 27 defeated proposed budgets submitted to them by the Board of Education. These budgets were presented for voter approval in accordance with §1716 of the New York Education Law and consisted of a detailed statement in writing of the amount of money which would be required for the ensuing year for school purposes exclusive of public moneys. Included in the overall budgets, and not separately voted upon were appropriations for textbooks.

In the absence of voter approval, the Board as required by law, became obligated to operate on a contingency or austerity budget (Education Law §2023). Under such a budget, the Board is authorized to levy a tax upon the qualified voters as if such tax had been approved by the voters, but only for a sum estimated necessary for "ordinary contingent expenses" and for teachers' salaries but not for all the expenditures set forth in the proposed budget. Ordinary contingent expenses have been defined as those expenditures authorized by statute, legal obligations of the district, and those items necessary to maintain the educational program, preserve school property and assure the health and safety of students and staff (see 7 State Education Department 153, Formal Opinion of Counsel 213, dated July 6, 1967). Illustrative of the items deemed to be included in the latter category are: instructional supplies for teacher use; maintenance of school facilities; and materials used in classes of students where uniformity is essential to the program or to preserve health and safety (i.e. dangerous chemicals

for a chemistry class). Clearly, the phrase "ordinary contingent expenses" was intended to limit expenditures under an austerity budget to those of a greater necessity than instructional supplies for students. Excluded from the definition of an "ordinary contingent expense" are those expenditures, which by law, may only be authorized by the qualified voters of a school district. Examples of such expense would be transportation for a distance less than three miles in grades nine to twelve and for a distance less than two miles in grades from kindergarten to eight; (see §3635 New York Education Law); and textbooks for children in classes below the seventh grade (see New York Education Law §703, subd. 2). §2024 of the New York Education Law provides that if any question shall arise as to what is an "ordinary contingent expense", the same may be referred to the Commissioner of Education. His decision shall be conclusive.

Accordingly, since the proposed budgets submitted in 1970 and 1971 were not approved, the Board of Education was without power and authority to furnish textbooks free to pupils enrolled in grades one to six.

Our position throughout this litigation was and continues to be that textbooks for all pupils are essential to a quality educational program. The action of the Legislature was not discriminatory. It simply did not go far enough. We have stated this in our opposing affidavits to the initial application of plaintiffs (A 40, 41) as well as in our formal Answer (A 35) and in our briefs. We have also several times stated our position that we oppose this litigation principally because we believe the remedy lies with the New York State Legislature (A 36, 40).

Argument

POINT I

New York Education Law § 701 is free of any invidious discriminatory purpose and effect, is supported by a compelling governmental interest, and is rationally related to a legitimate state end. Its challenged constitutionality is in essence an attack upon the policy making function of the Legislature.

Prior to 1965, the New York Education Law made no provision for free textbooks. At that time, §701 provided that school authorities may purchase textbooks and either rent or sell the same to the pupils attending the public schools. Under former §703, it was left to the voters in each school district to levy a tax for the purchase of textbooks to be furnished free to children attending the public schools in grades one to twelve. Under the 1965 amendment to §701, school districts were authorized to furnish free textbooks up to a certain average cost, to children enrolled in grades seven to twelve in public or private schools. Under the 1965 amendment to §703, it was left to the voters in each school district to levy a tax to furnish free textbooks in grades one to six.

The effect of these amendments was to require that free textbooks be furnished to all children in grades seven to twelve without voter approval, but that voter approval was required to do likewise for children in grades one to six.

In examining this classification, when attacked as a denial of equal protection, one must consider either of two constitutional standards. *First,* is the classification

rationally related to a legitimate state end. [see *McDonald* v. *Board of Elections*, 394 U.S. 802, 809 (1969)]; *McGowan* v. *Maryland*, 366 U.S. 420 (1961), *second*, is the classification justified by a compelling state interest. [see *Shelton* v. *Tucker*, 364 U.S. 479 (1960)]. Either standard may apply and would be sufficient to withstand a claim of denial of equal protection. The District Court applied the second standard and found a compelling state interest. The Court of Appeals, (A67), in indicating that both standards were appropriate in a case such as this, cited *Dandridge* v. *Williams*, 397 U.S. 471, 484 (1970) and *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. The Court of Appeals quoting from *Dandridge* at p. 485, 486, said:

> "The Court recognized that in the area of economics and social welfare, even where such legislation involves 'basic economic needs of impoverished human beings,' the Fourteenth Amendment gives the federal courts no power to impose upon the State their views of what constitutes wise economic or social policy."

The Court of Appeals indicated the long acceptance of this position as espoused in *McGowan* v. *Maryland*, *supra*, 366 U.S. at 426, which case stated:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affects some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests upon grounds wholly irrelevant to the achievement of the State's objectives...A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

So we have under attack, the action of the New York State Legislature, not for authorizing distribution of free

textbooks to secondary school students, but for not going further and also authorizing such free distribution to elementary school students. Obviously, had New York not provided textbooks without charge to secondary school students, there would be no case before this Court. (A71).

The District Court held in essence that the 1965 amendments resulted from action on a reasonable basis, free from irrationality or arbitrariness; that the Legislature was entitled to allocate its funds to pupils in those grades where it would do the most good; and that New York had a compelling interest in seeing to it that as many as possible of its children receive textbooks.

In *McDonald* v. *Board of Elections, supra,* 394 U.S. 802 (1969), the Court said:

> "The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally irrelevant to the pursuit of that goal. Legislatures are presumed to have acted constitutionally ...and their statutory classifications will be set aside only 'if no grounds can be conceived to justify them [citations omitted].' With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.' *Williamson* v. *Lee Optical of Oklahoma, Inc.* 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked."

The Court of Appeals (A 66) expressed the view with which we firmly agree, to the effect that its function was not to enact laws for the State of New York or to tell

the Legislature how better they could have legislated. It observed that it was restricted to making an examination of the law as actually enacted and to determining whether there was a reasonable basis for such classification. The Court concluded (A 73):

> "Unless the courts are to take over legislative functions and to decree that all children in all grades are to have free textbooks, the judgment of the legislature should control."

So also, the District Court concluded by citing *Snell* v. *Wyman*, 281 F Supp 853, 862 (SD NY 1968) aff'd. 393 U.S. 323 (1969).

> "Plaintiffs' complaints might move us to vote for changes if we sat as state legislators. But they do not approach the showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment."

The District Court also referred to *McInnis* v. *Shapiro* 293 F Sup 327, (N.D. Ill. 1968) aff'd. 394 U.S. 322, where after a discussion of cultivating the educational potential of each child, the Court quoted from *McInnis* as follows in part:

> ". . . But the allocation of public revenues is a basic policy decision more appropriately handled by a legislature than a court".

POINT II

The Constitutional claim of discrimination against indigent children is without merit. The rejection of a three judge court was proper since the Constitutional claim is unsound as evidenced by previous decisions of this court.

Appellants press the argument that they are subjected to an unfair burden in that they could not have textbooks unless approved by the voters. This thesis was clearly rejected by *James* v. *Valtierra,* 402 U.S. 137 (1971) in which a California statute which provided that low income housing could not be built without voter approval was under attack. This Court approved this arrangement because "referendums demonstrate devotion to democracy, not to bias, discrimination or prejudice."

Now can it be gainsaid that voter approval for textbooks in grades one to six is indicative of bias, discrimination or prejudice. Rather it is to be noted that the voters in West Hempstead, after consistent budget rejection, finally approved their school district budget on May 3, 1972 and are no longer operating on an austerity or contingent budget. Clearly these referenda, whatever the result, demonstrated the will of the electorate which in the final analysis is the bed-rock of our democratic processes.

Appellants contend that the voters should not be privileged to refuse to supply textbooks. This argument is based on a group of cases providing indigents, especially indigents accused of crime, access to the courts and free legal counsel. As the Court of Appeals noted (A 72), the reasoning of these cases is that the State is required to provide these services and access because to do otherwise would be to deprive indigents of due process. "*Obviously, though, due process is not involved here.*" [Emphasis supplied]

The claim that §701 discriminates against indigents is in fact a plea to avoid voter approval of funds for textbooks for elementary school children. It should be rejected for additional grounds on the basis of *Valtierra supra.* §701 makes no differentiation based on income level of the proposed recipients. As the Court of Appeals noted (A 70) referring to §701 "it instead draws the lines according to grade level. Thus clearly, this law is a valid means by which New York leaves some control over the school budgets to the voters of affected school districts."

In *Dandridge* v. *Williams supra,* 397 U.S. 471, 484 (1970) the Supreme Court stated:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification is not made with mathematical nicety or because 'in practice it results in some inequality' ".

Moreover, we would note New York State Education Law §3209 as part of Article 65 relating to compulsory attendance, provides as follows:

> "Public welfare officials, except as otherwise provided by law, shall furnish indigent children with suitable clothing, shoes, *books,* food and other necessaries to enable them to attend upon instruction as hereinbefore required by law". [Emphasis supplied]

Finally, on the basis of all of the foregoing, it is manifest that the denial of the motion to convene a three judge court was proper. The constitutional questions raised are not substantial. (See *Idlewild Bon Voyages Liquor Corp.* v. *Epstein,* 370 U.S. 713, 715 (1962) in which the Supreme Court stated the guidelines to be that the District Court's inquiry is appropriately limited to determining whether the

constitutional question raised is substantial. In determining substantiality, *California Water Service Co.* v. *City of Redding*, 304 U.S. 252, 255 (1938) held that a district court may reject a constitutional claim "because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." We think the decisions of this Court justify such rejection.

CONCLUSION

The challenge to §701 and §703 of New York's Education Law is an attack upon the policy making function of the Legislature. Appellants' educational arguments might move a legislator and from our point of view, we hope they do. Nevertheless, the responsibility for change rests not with the federal judiciary but with the state legislature. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5685

Supreme Court, U.S.
FILED
AUG 1
MICHAEL RODAK, JR.,

DAISY JOHNSON, DOROTHY MILLER, FORESTINE PRESSY, individually, and on behalf of their minor children and on behalf of all others similarly situated,

Petitioners,

against

NEW YORK STATE EDUCATION DEPARTMENT, EWALD B. NYQUIST, as Commissioner of the New York State Education Department, and the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR STATE RESPONDENTS

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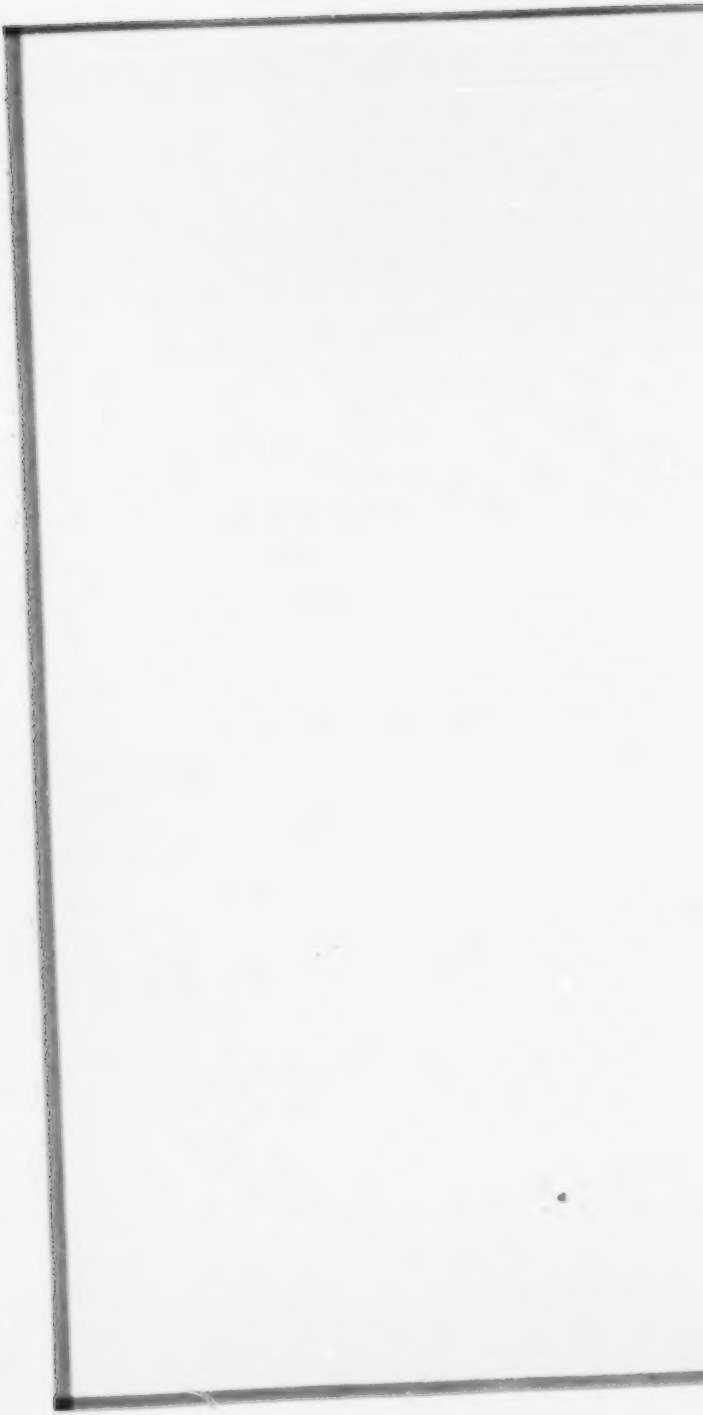


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5685

DAISY JOHNSON, DOROTHY MILLER, FORESTINE PRESSY, individually, and on behalf of their minor children and on behalf of all others similarly situated,

Petitioners,

against

NEW YORK STATE EDUCATION DEPARTMENT, EWALD B. NYQUIST, as Commissioner of the New York State Education Department, and the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR STATE RESPONDENTS

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 449 F. 2d 871. The opinion of the United States District Court for the Eastern District of New York is reported at 319 F. Supp. 271.

Jurisdiction

The judgment of the Court of Appeals was entered on August 13, 1971. The petition for a writ of certiorari was

filed November 6, 1971 and was granted February 22, 1972. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

Questions Presented

1. Should the complaint stand dismissed by reason of petitioners' failure to present a substantial constitutional question with respect to the provisions of New York Education Law §§ 701 and 703, relating to the purchase and use of textbooks in its schools?

2. In any event, is any actual case or controversy presented in view of the recent action of the qualified voters of the respondent School District in voting, for the school year 1972-1973, a tax allocating funds for the purchase and free distribution of textbooks to all children enrolled in grades one through six of the District's schools?

Statutes Involved

New York Education Law, § 701:

> "1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.
>
> 2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.
>
> 3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon

individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities.

4. No school district shall, during the school year nineteen hundred sixty-six—sixty-seven, the school year nineteen hundred sixty-seven—sixty-eight or the school year nineteen hundred sixty-eight—sixty-nine be required to purchase or otherwise acquire text-books, pursuant to this section, the cost of which shall exceed an amount equal to fifteen dollars multiplied by the number of children residing in such district who on the first day of October of such school year are enrolled in grades seven through twelve of a public or private school which complies with the compulsory education law, or in any subsequent school year be required to purchase or otherwise acquire textbooks, the cost of which shall exceed an amount equal to ten dollars multiplied by the number of children residing in such district and so enrolled on the first day of October of such subsequent school year; and no school district shall be required to loan textbooks in excess of the text-books owned or acquired by such district; provided, however that all textbooks owned or acquired by such district shall be loaned to children residing in the district and so enrolled in grades seven through twelve in public and private schools on an equitable basis.

5. In the several cities and school districts of the state, boards of education, trustees or other school authorities may purchase supplies and either rent, sell or loan the same to the pupils attending the public schools in such cities and school districts upon such terms and under such rules and regulations as may be prescribed by such boards of education, trustees or other school authorities.

6. The commissioner of education, in addition to the annual apportionment of public monies pursuant to article seventy-three of this chapter, shall apportion to each school district an amount equal to the cost of the text-books purchased and loaned by the district pursuant to this section, but in no case shall the aid apportioned to the district be in excess of the following amounts:

a. on account of expenditures made during the school year nineteen hundred sixty-six—sixty-seven, the school year nineteen hundred sixty-seven—sixty-eight or the school year nineteen hundred sixty-eight—sixty-nine an average of fifteen dollars per pupil residing in the district and enrolled in grades seven through twelve, and

b. on account of expenditures made in any subsequent school year an average of ten dollars per pupil residing in the district and enrolled in grades seven through twelve.

7. The apportionment provided for in this section shall be paid, at such times as may be determined by the commissioner and approved by the director of the budget, during the school year in which the expenditures are made to the extent that such expenditures have been made and reported to the department prior to such apportionment. Expenditures by a school district in excess of the average of fifteen dollars per

pupil in the school year nineteen hundred sixty-six—sixty-seven, the school year nineteen hundred sixty-seven—sixty-eight or the school year nineteen hundred sixty-eight—sixty-nine or in excess of ten dollars per pupil in any subsequent school year shall be deemed approved operating expense of the district for the purpose of computation of state aid pursuant to subdivision five of section thirty-six hundred two of the chapter, but expenditures up to such average of fifteen dollars or ten dollars above mentioned shall not be deemed approved operating expenses for such purpose."

New York Education Law, § 703:

"1. The qualified voters of any school district present at any annual school meeting or at any special school meeting duly and legally called for that purpose, shall have power, by a majority vote, to be ascertained by taking and recording the ayes and noes, to vote a tax for the purchase of all text-books used, or to be used, by pupils enrolled in grades one to six, inclusive, in the schools of the district.

2. If such tax shall be voted, it shall be the duty of the board of education or trustees of such district, within ninety days thereafter, to purchase and furnish free, text-books to all the pupils in grades one through six inclusive attending the schools in such district. [Notwithstanding the provisions of subdivision one of this section, where the qualified voters have failed, neglected or refused to authorize free distribution of textbooks, the board of education or trustees of the district may, within its discretion, purchase textbooks and either rent or sell the same to pupils in grades one through six, inclusive, attending the schools in such district].* Such board of education or trustees

*Matter in brackets [ ] was approved and became effective June 22, 1971, Laws of 1971, ch. 699.

shall have power to establish such rules and regulations concerning the use by the pupils of such text-books, and the care, preservation and custody thereof as it shall deem necessary."

Statement of the Case

This action was commenced in the United States District Court for the Eastern District of New York on September 16, 1970. Petitioners allege in their complaint: (1) that New York Education Law § 701 creates an arbitrary and discriminatory classification as between children in grades one through six and those in grades seven through twelve; (2) that §§ 701 and 703 require a majority vote approval of a tax to enable children in grades one through six to receive free text books, thereby constituting a denial of equal protection; and (3) that pursuant to §§ 701 and 703, textbooks can be obtained in grades one through six only upon payment of a rental fee ($7.50 per pupil), which petitioners cannot pay because of indigency, resulting in deprivation to their children of equal educational opportunity. By order dated October 28, 1970, the District Court (TRAVIA, J.) denied petitioners' application for the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 and dismissed their complaint. The order also denied petitioners' motion for a preliminary and permanent injunction and for a declaratory judgment declaring such sections unconstitutional.

On appeal, the United States Court of Appeals for the Second Circuit affirmed (2-1) the order of the District Court by decision dated August 13, 1971, the majority holding that no substantial constitutional question requiring the convening of a three-judge court had been presented for review.

Prior to 1965, the New York legislative scheme for distributing textbooks provided that they were to be dis-

tributed free to children in *all* grades of public schools *only* when authorized by the voters of the district [Laws 1947, c. 820].

In 1965, the New York State Legislature amended § 701 of the Education Law [Laws 1965, c. 320] to require local public school authorities to purchase and loan textbooks free of charge to all pupils in grades 7-12 in public and private schools. Section 703 was also amended [*ibid.*] to authorize the qualified voters of any local school district, by a majority, to vote a tax for the purchase by the school board of all textbooks for—and without any charge to—pupils in grades one through six.

Following rejection by the voters of respondent Union Free School District No. 27, Town of Hempstead, of the 1970-71 and 1971-72 school budgets, children enrolled in grades one to six in that District were charged a fee for the use of textbooks.*

Because of financial considerations, petitioners did not pay the requisite fee for obtaining textbooks. However, at the commencement of this action, counsel for the respondent Board of Education informed the Court and counsel for all parties that surplus textbooks were available in stock from preceding years, and that these books were being furnished free to petitioners' minor children. The Board did not initially distrubute these available textbooks free of charge to petitioners, due to a belief that § 703(2) did not empower them to do so. Clarification was, in any event, provided by the action of the Legislature in supplying the following addendum, effective June 22, 1971, to New York Education Law § 703(2):

"Notwithstanding the provisions of subdivision one of this section, where the qualified voters have failed,

---

*On May 23, 1972, the District voters in accordance with § 703(2) approved a tax for the 1972-73 budget to cover the purchase and free distribution of all textbooks to all the children in grades one to six.

neglected or refused to authorize free distribution of textbooks, the board of education or trustees of the district may, within its discretion, purchase textbooks and either rent or sell the same to pupils in grades one through six, inclusive, attending the school in such district."

According to information received from the Counsel and Deputy Commissioner for Legal Affairs for New York State's Department of Education, under this addendum, "if a school district has sufficient books on hand in a given school year so that no additional purchases need be made the books must be loaned free of charge for that year." (Appendix "A" p. 21)

POINT I

Petitioners do not raise a substantial federal constitutional question. Accordingly, the courts below properly dismissed the complaint.

A.

Long before this Court's pronouncement in *Brown* v. *Board of Education,* 347 U.S. 483, that "education is perhaps the most important function of state and local governments", *id.* at 493, New York, in recognition of this principle, provided in its Constitution that:

> "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. State Const., Art. 11, Section 1.

New York State, however, as other governmental units, be they federal, state or municipal, has been faced with continued mounting costs in fulfillment of its obligations to its citizenry including expenditures for education. In order to alleviate this grave financial crisis in the field of educa-

tion, the State Legislature has allocated the financing of textbooks between the state and local districts. The State has assumed full responsibility for furnishing free textbooks to all pupils in grades seven through twelve (N.Y. Education Law § 701[3]) and has empowered local school districts through their qualified voters to provide free textbooks in grades one through six by majority vote (*id.*, § 703).

Clearly, all three judges in the Court below were in consensus to the extent of holding that the first two causes of action were plainly insubstantial (69a-70; 74, note 1).* Apparently, petitioners have abandoned their claims under those causes of action before this Court despite the fact that they focused almost exclusively upon them in both of the courts below (in this connection, see also p. 14 of the *amicus* brief submitted by the Harvard University Center and the United Ministries).

Reversing the strategy they relied on below (*cf.* op. below at 878-879), petitioners now concentrate solely upon the claim (third cause of action) that § 703 violates their constitutional rights because it invidiously discriminates against them on account of their asserted indigency. This claim must necessarily fail both procedurally and substantively.

B.

From the procedural point of view, as noted by the Court below, if petitioners' claim is that a free education requires free textbooks, it is clear that in the present case it is not the state statute that is offensive, but rather the action of the school district voters in failing to vote taxes for textbooks. On this theory, the attack launched is one on a local action, and therefore not properly to be considered by a three-judge court.

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*Numerals followed by "a" refer to pages in petitioners' appendix.

If petitioners' contention is that the State should rearrange its scheme for the financing of education to obviate the necessity for voter approval of taxes for textbooks, the contention would be at odds with this Court's opinion in *James* v. *Valtierra,* 402 U.S. 137.

In the instant case, approval is for the sole purpose of raising revenues to purchase textbooks to be used by pupils enrolled in grades one through six in the District, and it cannot seriously be argued that it is in fact aimed at what petitioners conceive to be an "insular minority." Rather, as this Court stated in *Valtierra:*

> "The procedure for democratic decision making does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws.' " *id.* at 143.

C.

New York Education Law §§ 701(3) and 703 involve a clearly valid exercise of legislative powers.

Section 701(3) was amended in 1965 to require local public school boards to lend textbooks free of charge to all students in grades seven through twelve.

Prior to 1965, these school boards had authority to purchase and to rent or sell textbooks and other supplies to all children attending school, but a majority of qualified voters might vote a tax to provide funds to purchase and furnish free such textbooks. See *Board of Education etc.* v. *Allen,* 392 U.S. 236. The importance of such vote is reflected in *Kramer* v. *Union Free School District,* 395 U.S. 621, 623 (1969). By the 1965 amendment discussed in *Allen,* the State undertook to defray the expense of the furnishing of free textbooks by the local school districts. This provides State aid, in addition to the annual apportionment to each school district, in an amount equal to the cost of textbooks purchased and loaned by the district

to public and private school children up to a limit of $10 per pupil in grades 7-12. The State Department of Education estimated that the cost of such textbooks had been $5.50 per pupil, but noted that "there is nothing in the bill to restrain local school districts from spending up to $10 every year for every child, 7-12" (McKinney's 1965 Session Laws of New York, p. 2056).

New York, with its finite limited resources, set forth the reasons for mandatory textbooks only for children in the upper grades in the Statement of Purpose which accompanied the 1965 amendment of § 701 by the Legislature:

> "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. . . . It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state" [Laws of 1965, Ch. 320, § 2].

In accordance with this policy declaration, explicitly aimed at correcting imbalance in our educational system leading to insufficient numbers of students proficient in the fields of science, mathematics, etc., the New York Legislature has sought to alleviate that condition by concentrating upon the junior high school and high school levels where these subjects are primarily taught, and where the number and expense of textbooks required for the purpose would impose a heavier financial burden upon the students

enrolled in those grades. Thus the legitimate concern of the Legislature in dealing initially with the monetary problem facing the older, more advanced students is clearly understandable, and plaintiffs' attack does not approach "the kind of caprice which could generate serious doubts under the equal protection clause." *Snell* v. *Wyman*, 281 F. Supp. 853, 866 (S.D.N.Y. 1968), *aff'd* 393 U.S. 323 (1969).

It should be noted, moreover, that the use of textbooks free of charge by grade 1-6 pupils in New York is far more extensive than petitioners' contentions would imply—especially in large urban areas where, as is well known, the overwhelming percentage of welfare families reside. Large numbers of poor children throughout New York State are simply not attending school in the lower grades without free textbooks. Thus, in city school districts, the boards of education are authorized to provide—independent of the voters—free textbooks and other supplies to schoolchildren in all grades. See N.Y. Education Law Art. 51, § 2503, subd. 7 (applicable to cities with less than 125,000 population; § 2501) and Art. 52, § 2554, subd. 7 (applicable to the Cities of New York, Buffalo, Rochester, Syracuse and Yonkers; § 2550 [Albany, with its decrease of population to below 125,000 now falls under Art. 51, pursuant to L. 1972, c. 65]).

This Court in *McDonald* v. *Board of Elections*, 394 U.S. 802, stated in no uncertain terms that:

> "Though the wide leeway allowed the State by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently and the presumption of statutory validity that adheres thereto admit of no settled formula, some basic guidelines have been firmly fixed. The distinction drawn by a challenged statute must bear some relationship to a legitimate state end and will be set aside as violative of

the Equal Protection Clause only if based on reasons totally irrelevant to the pursuit of that goal. Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only 'if no grounds can be conceived to justify them [citations omitted].' With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every end that might conceivably have been attacked. . . ."

Petitioners' reliance upon *Shelton* v. *Tucker*, 364 U.S. 479, 488, for the proposition that the legislative purpose could be pursued by less drastic means is without merit in the context of the instant subject of this litigation. (But see opinion of the District Court [54a-55a] outlining the various alternatives facing the Legislature.) Clearly, the "less drastic means" doctrine is applied in cases of "constitutionally protected interests" (*Dunn* v. *Blumstein*, —— U.S. ——, 31 L. Ed. 2d 274) (*e.g.*, voting and interstate travel) and not those dealing with social welfare as in the case at bar. "The very complexity of the problems suggest that there will be more than one constitutionally permissible method of solving them." *Jefferson* v. *Hackney*, 32 L. ed. 2d 285, 296.

D.

Petitioners' reliance upon the claim that education is a fundamental right, and that the statute impinges upon petitioners' access to that right, distorts the dimensions of the actual litigation presented here.

We recognize, as this Court noted in *Shapiro* v. *Thompson,* 394 U.S. 618, that a State in order to preserve its financial integrity "may not accomplish such purpose by invidious distinctions between classes of citizens [so as to] reduce expenditures for education by *barring* indigent children from its schools." *Id.* at 733 (emphasis supplied). We are not barring anyone, for any reason, from access to our schools. This fact totally exposes petitioners' untoward reliance upon *Griffin* v. *Illinois,* 351 U.S. 12; *Douglas* v. *California,* 372 U.S. 353; and *Boddie* v. *Connecticut,* 401 U.S. 371, for all these cases deal with the State's shutting off of *access* to the courts.

In *Douglas,* this Court found that ". . . where the merits of the *one and only appeal* an indigent has as of right are decided without benefit of counsel we think an unconstitutional line has been drawn between rich and poor." *Id.* at 357 (emphasis in text).

In *McGinnis* v. *Shapiro,* 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd. per curiam* 394 U.S. 322, the plaintiffs analogized (in an education case) as petitioners do here, to *Griffin* and *Douglas.* The Court rejected the analogy noting that the decided cases established significant but limited principles. "The holding in *Douglas* derived primarily from its criminal justice setting rather than the poverty of the defendant." *McGinnis* v. *Shapiro, supra,* at 334. And indeed, this Court pertinently observed in *Douglas* that:

> "When society acts to *deprive* one of its members of his *life, liberty* and *property,* it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." *Douglas* v. *California, supra* at 357. (emphasis supplied)

In *Boddie*, this Court held that the Due Process Clause required that those appellants be afforded access to the Court to obtain a divorce. *Id.* at 122.*

Neither do petitioners advance their argument by claiming that education is a fundamental right which will condition the State's desire to preserve its financial integrity only upon a showing by the state of a compelling state interest. There is a stark difference between, a fundamental constitutional right such as voting (*Harper* v. *Virginia State Board of Elections*, 383 U.S. 663) or travel (*Shapiro* v. *Thompson, supra*) and education, which can more accurately be described as one of fundamental importance.

As Mr. Justice STEWART noted in his concurring opinion in *Shapiro* v. *Thompson, supra:*

> "The court today does *not* 'seek out particular human activities, characterize them as "fundamental" and give them added protection. . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." Concurring opinion at 642. (Emphasis in text)

This Court observed in *Brown* v. *Bd. of Education*, 347 U.S. 483, 493, that in the field of compulsory education ". . . where the state has undertaken to provide it, it is

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* It is noteworthy that all three decisions in *Griffin, Douglas* and *Boddie* are grounded upon the Due Process Clause, unlike the complaint at bar which seeks relief under the Equal Protection Clause of the Fourteenth Amendment. Moreover, as noted in *Boddie*, the plaintiffs alleged that "welfare income . . . includes no allotment that could be budgeted for the expense to gain access to the courts in order to obtain a divorce." *Boddie* v. *Connecticut, supra* at 372-373. Welfare payments similarly would not cover defense of criminal prosecutions. Here, the Court of Appeals suggested that the "fixed allowance" petitioners received under New York's Welfare Law "was intended to cover this as well as other contingent needs."

a right which must be made available to all on equal terms." This is in marked contrast to a fundamental constitutional right which is not one for a state to extend or withhold at its pleasure. New York has undertaken, of course, to provide public education, but in testing its response to the needs for education as in the general area of social welfare, the traditional notions of equal protection apply. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78; *McGowan* v. *Maryland*, 366 U.S. 420, 426; *Dandridge* v. *Williams*, 397 U.S. 471, 484; *Jefferson* v. *Hackney*, —— U.S. ——, 32 L. Ed. 2d 285, 296.

In *Jefferson* v. *Hackney*, *supra*, this Court again emphasized, as it had recently in *Dandridge*, that:

> "In 'the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect.' A legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.' *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488. So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them." *Jefferson* v. *Hackney*, *supra* at 296.

Consistent with this approach, in *Briggs* v. *Kerrigan*, 431 F. 2d 967, 969 (1st Cir. 1970), *affg.* 307 F. Supp. 295 (D. Mass. 1969), the Court approved of a Boston practice of giving free lunch only to children in the secondary grades relying upon "the wisdom of the remainder in *Dandridge* [*supra*] that the Fourteenth Amendment does not require the government either to attack a program in its entirety or not at all."

See also *McInnis* v. *Shapiro*, 293 F. Supp. 327, 336 (N.D. Ill. 1968), *aff'd. per curiam* 394 U.S. 322, where the District Court pertinently stated that "[t]here is no constitutional requirement that public school expenditures be made only on the basis of pupils' educational needs without regard to the financial strength of local school districts."

In truth, petitioners' complaint is not with the state statute or the voters of the school district for, as the Court below properly noted, a student's need for textbooks even if determined to be a "basic need" is no more "fundamental than such items as food and clothing which are provided through welfare grants." (72a, footnote 11).*

The State of New York, in empowering local school district voters to assess a tax for textbook purchases (§ 703), under *James* v. *Valtierra*, 402 U.S. 137, clearly did not violate the Equal Protection Clause; nor did its rational legislative determination in mandating purchases of text-

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* Section 131-a of the New York State Social Services Law [McKinney's Consol. Laws, Supp. 1971] abolishes the old system of special grants for specific items of need, replacing them with fixed grants to be determined based on the needs of families in the area which the recipient lives. Petitioners allege that under the old system, grants were made to pay for textbooks. In *Rosado* v. *Wyman*, 397 U.S. 397 (1970), the Supreme Court held this section as originally enacted, to be in violation of 42 U.S.C. § 602(a)(23) which requires that a state in order to receive federal benefits must not lower the standard of need in use in that state on January 1, 1967. Thereafter, the New York Legislature passed the new version of § 131-a now in effect, excluding from the maximums such items as housing, fuel for heating, furniture, and child care services. New York has continued to receive federal funds, and no allegation is made here that § 131-a is still inconsistent with 42 U.S.C. § 602(a)(23). Thus it would appear that the fixed allowance received by petitioners was intended to cover this as well as other contingent needs. This is especially so since the failure to provide books resulted in a similar expense for all children in the School District.

Effective July 1, 1971, § 131-a was amended and New York enacted a ten per cent reduction in the level of benefits. This reduction was upheld by this Court in *Goodwin* v. *Wyman*, —— U.S. —— on the decision in *Jefferson* v. *Hackney*, *supra*.

books for grades seven through twelve, under the doctrine of *Dandridge* v. *Williams, supra,* violate petitioners' rights. Accordingly, the Court below properly determined that petitioners' claims were insubstantial (*California Water Service Co.* v. *City of Redding,* 304 U.S. 252, 255) and that a three-judge court should not be convened.

POINT II

The qualified voters of the Local School District, having voted a tax for the school year 1972-1973, providing free textbooks for the lower grades, the instant action for declaratory relief must fail since there is no actual case or controversy presenting concrete issues.

As noted in Point I, *supra,* petitioners have in effect abandoned their first two causes of action and seek only declaratory relief with respect to New York Education Law § 701, *et seq.*

On May 3, 1972, the qualified voters of the respondent school district elected by majority vote to assess a tax for the purchase of *all* textbooks for grades one through six in the schools of the district. As this Court observed in *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270, 273:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests of suffi-

cient immediacy and reality to warrant the issuance of a declaratory judgment."

Under the instant circumstances (given the fact that books are being provided for all students and the life expectancy of the books themselves), it is indeed unlikely that there can be a finding of "sufficient immediacy and reality" here. What may happen several years hence, if at all, presents at worst "a hypothetical threat." *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89-90.

As this Court observed in *Golden* v. *Zwickler*, 394 U.S. 103:

> The same is true of the power to pass upon the constitutionality of state statutes. No federal court, whether this Court or a district court, has jurisdiction to pronounce any statute void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. Liverpool, N.Y. & P.S.S. Co. v. Commissioners, 113 U.S. 33, 39 (1885) (emphasis added.)" *Id.* at 110.

Since there is no actual controversy before the Court, and because "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions" (*United Public Workers of America* v. *Mitchell*, *supra* at 89), the complaint should, for this additional reason, be dismissed.

CONCLUSION

The order of the Court of Appeals for the Second Circuit should be affirmed and, for the additional reason that there is no actual and present controversy between the parties, the complaint should be dismissed.

Dated: New York, New York
July 31, 1972

Respectfully submitted,

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Appendix A.

The University of the State of New York
THE STATE EDUCATION DEPARTMENT
Albany, New York 12224
Counsel
and
Deputy Commissioner for Legal Affairs

July 21, 1972

Re: Johnson et al. v. New York State Education Dept. et al.

Dear Miss Steel:

This is in answer to your letter of July 17 in the above entitled matter.

I am enclosing, for your information, copy of chapter 699 of the Laws of 1971. The bill was sponsored by this Department, and I am also enclosing a copy of our Memorandum in Support.

Prior to the 1965 and 1966 amendments to the Textbook Law, section 701, subdivision 3 thereof authorized boards of education to purchase textbooks and either rent or sell the same to the students. At that time, also, section 703 made the provision of free textbooks subject to the voters of school districts.

Under this state of the law, the following solution was possible for situations where a budget was defeated and, therefore, no new textbooks could be bought for free use. A school district would have, for instance, a thousand textbooks on hand in a given subject because of purchase during the previous year when the budget was passed by the voters. The following year, an additional 200 students might be in need of books so that 1,200 were needed instead of a thousand. Under such circumstances, said subdivision 3 authorized the board to purchase the additional 200 books and rent all 1,200 books to the students at a rental which would yield the purchase price for the additional 200 books.

When the 1965 and 1966 legislation was enacted, subdivision 3 of section 701 was repealed.

Consequently, it became impossible for a school district, faced with a situation described above to solve the matter in the manner indicated. Consequently, legislation was sponsored by the Department which finally culminated in the enactment of chapter 699 of the Laws of 1971. This restored the possibility referred to above of solving this type of problem which occurred in many instances. Obviously, a board of education cannot pick and choose the students to whom to give free textbooks from existing stocks. This would violate the Equal Protection Clause of both constitutions.

In answer to your specific questions, if a school district has sufficient books on hand in a given school year so that no additional purchases need be made, the books must be loaned free of charge for that year.

If on the other hand, some additional books need be purchased, the total number of books would need to be rented out to the students with the rental computed so as to yield the purchase price for the additional books.

This has been the advice given consistently over the many years to school districts faced with this type of problem.

It should be added that the school district purchase of the additional volumes will result in a saving to individual students because of both the volume discount and the special education discount available for this purpose.

If we can be of any further assistance, please advise.

Sincerely,

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Robert D. Stone

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OCT 31 197
MICHAEL ROD JR. CLK

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-5685

DAISY JOHNSON, DOROTHY MILLER, FORESTINE PRESSY, individually and on behalf of their minor children and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

NEW YORK STATE EDUCATION DEPARTMENT, EWALD B. NYQUIST, as Commissioner of the New York State Education Department, and the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead,

Defendants-Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF ~~APPELLANTS~~ PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-5685

DAISY JOHNSON, DOROTHY MILLER, FORESTINE PRESSY, individually and on behalf of their minor children and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

NEW YORK STATE EDUCATION DEPARTMENT, EWALD B. NYQUIST, as Commissioner of the New York State Education Department, and the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead,

Defendants-Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

A. Events Since the Granting of Certiorari

The local school board informs the Court that the district voters, "after consistent budget rejection, finally

approved their school district budget on May 3, 1972," and textbooks are being provided free during the current school term to students in grades 1-6. This recent development, however, must be viewed in (1) the context of the district's voting pattern during the last three school years when six of seven school budgets were defeated;[1] (2) the local school board's continued admission that in the event of budget rejection they are "without power and authority to furnish textbooks free to pupils enrolled in grades one to six," [Board's Brief, p. 4]; and, (3) the requirement pursuant to §1716 of the New York Education Law that there be annual budget referenda.

Appellee State argues that the recent voter action renders the appeal moot. Additionally, it seeks to advance "evidence" not a part of the record. This Reply Brief is limited to analyzing the State's argument and to establishing that the action remains a continuing controversy appropriate for resolution of this Court.

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[1]Significantly, the action by the voters in the local district has not signalled the end of the statewide trend toward continued budget rejection. Mr. Louis DiGuilio, Assistant, Bureau of School Business Management, New York State Education Department, Albany, New York, stated in a telephone conversation, on September 22, 1972 that during the current school year 28 school districts have defeated budget.

ARGUMENT

THE CASE IS NOT MOOT AND DECLARATORY AND INJUNCTIVE RELIEF IS APPROPRIATE

A. The Reasonable Expectation that the Wrong Will Be Repeated.

The most recent action of the voters has not rendered this case moot. The pattern of consistent budget rejection is documented by the record before this Court. [App. 45, 60]. The challenged legislative scheme for distributing textbooks to grades 1-6 remains in force. These facts, considered together with the local Board's admission that absent voter approval of a budget the Board is "without power and authority to furnish textbooks free to pupils enrolled in grades one to six," [App. pp. 35, 41] establish, at a minimum, a "reasonable expectation that the wrong will be repeated." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-633 (1953); *Gray v. Sanders*, 372 U.S. 368, 375-376 (1963). Moreover, a mootness finding would shield the challenged practice from scrutiny; it would be "capable of repetition, yet evading review." *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969), quoting *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911).

In *Gray v. Sanders* and *Moore v. Olgive, supra*, this Court reached the merits in election law challenges despite the completion, prior to the Court's action, of the particular elections giving rise to the cases. In *Gray*, the Court noted that the challenged law "remain[ed] in force; and . . . would govern future elections" and that "the practice [was] deeply rooted and longstanding." 372 U.S. at 376. Similarly, in *Moore*, the Court observed that the contested provision "remains and controls future elections. . . ." 394 U.S. at 816. In each case, this Court

characterized the complaint as seeking "declaratory relief" and, in effect, declared the rights of the parties. *Gray, supra*, 372 U.S. at 370, 376-381; *Moore, supra*, 394 U.S. at 815, 818-819.

Gray and *Moore* establish the propriety of injunctive and declaratory relief in the case now before the Court. There will be annual budget referenda[2] and given the recent voting pattern and the local district's admission of its obligations under the challenged state law, the fee requirement may properly be viewed as "deeply rooted and longstanding." Furthermore, since plaintiffs sued, pursuant to Rule 23, on behalf of a class of poor persons with children in grades 1-6, [App. at 8] it is apparent that those involved will be affected by future budget rejections.[3]

The State argues that declaratory relief is inappropriate, citing general language from several cases. [State's Brief, pp. 18-19]. But the cases cited establish only that there is no litmus paper test; the particular facts of each case must control the Court's determination. Here as we have shown, a decision on the merits is warranted.[4]

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[2]In contrast *Moore* involved presidential elections occurring only every four years. 394 U.S. at 815.

[3]The Nassau County Department of Social Services reports that there are 898 individuals receiving public assistance in the West Hempstead school district. *Newsday*, February 23, 1971, p. 24. According to the U.S. Bureau of Census, more than 5% of the families in the school district have annual incomes below $3,999. United States Department of Commerce, *General Social and Economic Characteristics–New York*, 1970 Census.

[4]The weakness of the State's argument emerges from a more detailed consideration of *Golden v. Zwickler*, 394 U.S. 103 (1969), one of the cited cases. In *Golden*, alleging a desire to distribute anonymous leaflets directed at a particular Congressman, plaintiff

Appellants have diligently pursued their constitutional challenge to the statutory scheme in the Courts. Nevertheless, judicial resolution of the controversy has spanned three school years. It is a deep-rooted principle of law that, "where the delay in rendering a judgment or decree arises from the act of the Court, that is, where the delay has been caused either for its convenience or by the multiplicity or press of business either by the intricacy of the question involved or any other cause not attributable to the laches of the parties, the judgment or decree in the interest of justice, may be entered retrospectively as of the time when it should or might have been entered up." Mr. Justice Douglas, dissenting in *Parker v. Ellis*, 362 U.S. 574, 599 (1960) quoting *Mitchell v. Overman*, 103 U.S. 63, 64-65 (1880).

B. The Public Interest in Having the Question of Law Settled.

Where, as appellants have demonstrated, there is a reasonable expectation that the wrong will be repeated coupled with a public interest in having the legality of the practices settled, this Court has recognized an exception to the mootness doctrine.[5] *United States v. W. T. Grant*,

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challenged a New York law forbidding unsigned materials. In ruling that declaratory relief was inappropriate, this Court noted that the Congressman had become a State Court Judge, a position with a 14 year term. 394 U.S. at 109 and n. 4. Thus, in the Court's words, it was "most unlikely that the Congressman would again be a candidate for Congress. . . ." 394 U.S. at 109. There is no basis for a similar statement in this case.

[5]One measure of the importance of the question presented is the fact that during the preceding five years, 1967-1971, the taxpayers in New York State rejected 497 of the 3610 school budgets. In two of the years, 1969 and 1971, the voter rejection rate was approximately 20 per cent. A. Buell Arnold, Director,

Co., supra, 345 U.S. at 623-633; *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 309-310 (1897).

Recently, this Court in *Dunn v. Blumstein*, 405 U.S. 330, n. 2 at 333 (1972) decided a case involving residency requirements for voting in the State of Tennessee. In that case, Justice Marshall observed as follows:

> "The District Court properly rejected the State's position that the alleged invalidity of the three-month requirement had been rendered moot, and the State does not pursue any mootness argument here. Although appellees now can vote, the problem to voters posed by the Tennessee residency requirements is 'capable of repetition, yet evading review.' "

"Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 552 (1937).

In *Boggess v. Berry Corporation*, 233 F.2d 389, 391 [9th Cir. 1965], the Ninth Circuit stated:

> "Where, however, interest of a public character are involved under conditions that may immediately be repeated, thus giving the litigation a continuing character, . . . the mere fact that the particular

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Division of Educational Management Services, New York State Education Department, Albany, New York, Memorandum, Budget Defeat Information, November 3, 1971; Mr. Arthur Jones, Supervisor, Division of Educational Management Services, New York State Education Department, Albany, New York, telephone conversation October 2, 1972.

subject matter of the instant cause has expired does not render the case moot."

Thus, where recurring questions of public interest are involved, "federal courts have recognized an exception to the mootness doctrine." *Ihrke v. Northern States Power Company*, 459 F.2d 566, 571 [8th Cir. 1972].

C. The State's New "Evidence"

The State attempts, through its Brief, to introduce "evidence" at the appellate level. This attempt to supplement the record nearly two years after the commencement of the action is not only improper,[6] but totally without merit. Without citation to the appendix agreed upon for use in this Court or any documentation, the State asserts that:

> "at the commencement of this action, counsel for the respondent Board of Education informed the Court and counsel for all parties that surplus textbooks were available in stock from preceding years, and that these books were being furnished free to petitioners' minor children." [State's Brief, p. 7].

The statement is baseless. The local school Board, both in its answer and in affidavits filed in the District Court on October 10, 1971, admitted that textbooks were denied students whose parents were unable to pay the fee. [App. 7, 34, 41]. The State filed neither an answer

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[6] As far back as 1887 this Court in *Schley v. Pullman's Palace Car Co.*, 120 U.S. 575, held that on appeal it is the record alone and not facts advanced in the briefs which may be given effect. See, too, *Bono v. United States*, 113 F.2d 724 [2nd Cir. 1940]. "Factual statements contained in the party's brief are not a part of the record." *In re Frank Fehr Brewing Co.*, 268 F.2d 170, 183 (6th Cir. 1959).

nor any affidavits in the District Court, the appropriate means by which to controvert allegations. Instead, the State moved to dismiss the complaint, thereby conceding the factual allegations made by the plaintiffs and the admissions of the local school board. See, *e.g. Gardner v. Toilet Goods Association*, 387 U.S. 167, 172 (1967). It is also significant that the State's assertion was not made in any of its four previous briefs, nor in its argument before the Court of Appeals.[7]

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[7]For information of this Court, the following did occur:

The 1970-71 school term began in the local district on September 9, 1970. As alleged by plaintiff [App. at 7, 22, 24, 26] and admitted by the local school board [App. at 34] those children whose parents could not pay the rental fee were denied textbooks. For more than four weeks, plaintiffs' children and other children unable to afford the fees were forced to attend school without the required textbooks. After the final hearing before the District Court on October 6, 1970, at which time preliminary relief was denied, counsel for both the local board and plaintiffs, out of mutual concern to limit the educational and psychological harm being visited upon plaintiffs' children, agreed, out-of-court, that plaintiffs' counsel would deposit $30 with counsel for the board, and the board would in turn issue textbooks to the named plaintiffs' children. It was agreed that the deposit would be made and accepted without prejudice to the rights of either party in the pending litigation. At the start of the 1971-72 school term, the local district continued adherence to the policy of denying textbooks to children whose parents could not pay rental fees. Mrs. Rosemary Imbergamo's daughter, Lisa, attending first grade, was denied textbooks for a substantial portion of the 1971/72 term. See affidavit appended to this brief. Mrs. Imbergamo is a member of the class represented by plaintiffs. [App. at 8]. In *Evers v. Dwyer*, 358 U.S. 202, 203-204 (1958), this Court held that the appellant who had boarded the bus for the purpose of challenging a state law segregating passengers, but who left the bus when threatened with arrest, demonstrated the existence of an actual controversy. Just as continuing to ride the buses was not required in *Evers*, neither should appellants' children be required to continue attending school without textbooks to demonstrate the existence of an actual controversy.

Furthermore, the Attorney General appends to his Brief a letter from the Counsel and Deputy Commissioner of Legal Affairs for the Appellee State Education Department. [Appendix A., State's Brief at 21]. The substance of this letter, written nearly two years after the action was commenced, appears to be that when a budget is defeated a district may: (1) distribute free any books already on hand, and, (2) limit its charge to parents to each student's pro-rata share of the cost of additional books. If no additional books are needed, existing stocks must be loaned free. [State's Brief at 21-22].

There is nothing in the record before this Court upon which to conclude that the procedures outlined by the State in Appendix A were not followed by the local district. It would appear that the $7.50 fee may well have been required despite the utilization of the procedures outlined. According to counsel for the local school district, textbooks must be replaced every five years. The $7.50 fee charged in 1970-71 and 1971-72, therefore, represents each student's pro-rata share of the cost of replacing a portion of the total stock of texts. What impact, if any, the State's contention has on the case before this Court is speculative. There is nothing in the record to justify attaching any weight to the State's Appendix.

CONCLUSION

The controversy is not moot and Appellants have demonstrated the appropriateness of injunctive and declaratory relief.

Respectfully submitted,

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October 3, 1972

APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES

DAISY JOHNSON, DOROTHY MILLER, FORESTINE PRESSY, individually and on behalf of their minor children and on behalf of all others similarly situated,

Plaintiffs-Appellants

-against-

NEW YORK STATE EDUCATION DEPARTMENT, EWALD B. NYQUIST, as Commissioner of the New York State Education Department, and the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead,

Defendants-Appellees

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF NASSAU)

ROSEMARY IMBERGAMO, being duly sworn, deposes and says:

I reside at 590 Park Avenue, West Hempstead, New York, together with my two children, Lisa, age 7, and James, age 5.

Lisa is presently attending the second grade at the Delaney School in the West Hempstead Public School District.

During the 1970-71 school year, Lisa attended kindergarten in the same school. Last year Lisa attended the first grade.

At the start of the 1971-72 school term, I was notified by the West Hempstead Public School District that I would have to pay a rental fee of $17.50 to obtain textbooks for Lisa.

I was at that time, and still am, a recipient of public assistance from the Nassau County Department of Social Services. I was, therefore, unable to pay the rental fees, and consequently, Lisa went without textbooks from the start of school early in September until approximately November, 1971, at which time the district provided Lisa with textbooks for the remainder of the school term.

I have received a bill from the district in the sum of $17.50 for the textbooks furnished to Lisa last term, but I have been unable to pay the rental fee demanded.

/s/ Rosemary Imbergamo

Sworn to before me this
27th day of September, 1972
/s/ Cecille Kaden

CECILLE KADEN
Norary Public, State of New York
No. 20-2013750
Qualified in Nassau County
Commission Expires March 30, 1973

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–5685

Daisy Johnson et al., Petitioners,
v.
New York State Education Department et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[November 20, 1972]

PER CURIAM.

We granted certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, 449 F. 2d 871 (1971), affirming the District Court's dismissal of petitioners' complaint challenging the constitutionality of New York Election Laws §§ 701 *et seq.* (1971). 405 U. S. 916 (1972). However, respondents' brief states that "[o]n May 3, 1972, the qualified voters of the respondent school district elected by majority vote to assess a tax for the purchase of *all* textbooks for grades one through six in the schools of the district." In light of this fact, and given the suggestion at oral argument that the books themselves have a life expectancy of five years, the judgment is vacated and the case is remanded to the United States District Court for the Eastern District of New York to determine whether this case has become moot.

SUPREME COURT OF THE UNITED STATES

No. 71–5685

Daisy Johnson et al., Petitioners, v. New York State Education Department et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[November 20, 1972]

MR. JUSTICE MARSHALL, concurring.

While I join the Court's decision, I feel obliged to state somewhat more fully what I view to be the reasons for and meaning of this remand.

The New York statutory scheme here under attack effectively denies textbooks to indigent elementary public school children unless the voters of their district approve a tax especially for the purpose of providing the books.[1] Petitioners who are indigent recipients of public assistance allege, *inter alia*, that the statute, as applied to their children, creates a wealth classification violative of the Equal Protection Clause.

When this action was initiated in September 1970, respondent Board of Education of Union Free School District No. 27 was not providing free textbooks to petitioners' children, although textbooks were available upon the payment of a fee, which petitioners were unable

[1] Under New York law, local school districts are required to loan textbooks free to students in grades seven through 12. N. Y. Education Law § 701 (1971). No such provision is made for children in grades one through six; free textbooks are to be made available to children in those grades only upon the vote of the majority of the district's eligible voters to levy a tax to provide funds for the purchase of the textbooks, N. Y. Education Law § 703 (1971).

to afford.[2] The practical consequence of this situation was that indigent children were forced to sit " 'bookless, side by side in the same classroom with other more wealthy children learning with purchase[d] . . . textbooks, [thus engendering] a feeling of inferiority and unfitness in poor children [which] is psychologically, emotionally, and educationally disastrous to their well being.' "[3] Indeed, an affidavit submitted to the District Court indicated that in at least one case, an indigent child was told that "he will receive an 'F' for each day because he is without the required text-books. When the other pupils in the class read from text-books, the teacher doesn't let him share a book with another pupil, instead she gives him paper and tells him to draw."[4] Despite this evidence, the Court of Appeals, with one Judge dissenting, affirmed the District Court's dismissal of the complaint. We granted certiorari.[5]

This case obviously raises questions of large constitutional and practical importance. For two full school years children in elementary grades were denied access to textbooks solely because of the indigency of their families while these questions were considered by the lower courts. After we had granted certiorari, however, a majority of the voters in respondent school district finally agreed to levy a tax for the purchase of textbooks for the elementary grades, and we are told that free textbooks have now been provided.

I join in the Court's decision to remand the case so that the District Court can assess the consequences of this new development. I do so because I believe that the Court acts out of a proper sense of our constitutional

[2] The fee imposed was $7.50 per child.

[3] 449 F. 2d 871, 873 (CA2 1971) (quoting with approval petitioners' allegations).

[4] Affidavit of Carl Jay Nathanson, at 2.

[5] 405 U. S. 916 (1972).

duty to decide only live controversies, and because I believe that the District Judge can best resolve the factual issues upon which proper resolution of the mootness question depends. Certainly, our mere act of remanding in no way suggests any particular view as to whether this case is in fact moot. That decision is for the District Judge in the first instance.

In reaching his decision, the District Judge will, of course, have to take into account the standards which we have previously articulated for resolving mootness problems. On the one hand, "[a] case [may be] moot if subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 203 (1968). See also *SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403 (1972). But on the other, "[m]ere voluntary cessation of illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *United States* v. *Concentrated Phosphate Export Assn., Inc.*, *supra*, at 203. In the context of constitutional questions involving electoral processes, these principles have generally found expression in the proposition that a case is not moot if "[t]he problem . . . is 'capable of repetition, yet evading review.'" *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969).*

In applying these standards to this case, the District Judge should ascertain the nature of the textbook problem for the elementary grades in respondent school district. Respondents have not suggested that the prob-

* These prior statements provide only rough guidance in this case, particularly since we deal here with an electoral process which is employed only on an irregular basis as new books are needed. Nevertheless, I think they are enlightening as to the appropriate inquiries for the District Court to make on remand.

lem has been resolved once and for all by the recent purchases. To be sure, they do contend that the new textbooks have a useful life of five years. But does this adequately account for destruction by extraordinary events, for loss due to theft, and for obsolescence due to curriculum changes? And, even accepting the five-year figure, does this make the problem a non-recurring one insofar as the continuing viability of this litigation is concerned?

The District Judge should also investigate the posture in which the legal issues presented by this case might again arise when the books begin to wear out. Will the respondent school district delay holding a new election until the new books are actually needed? Is it possible that litigation would again have to proceed for an entire school year, or more, while indigent children are deprived of books before the constitutionality of that deprivation is finally determined?

These seem to me essential questions for the District Court to consider on remand in disposing of the issue of mootness.[7]

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[7] Nor should the District Court overlook the fact that this is a class action brought by petitioners "on their own behalf and on behalf of their children and all other persons similarly aggrieved." Even if the case is now moot as to these particular petitioners, there may be other members of the class who remain aggrieved and thus the action may remain a viable one, see, *e. g.*, *Cypress* v. *Newport News General & Nonsectarian Hospital Assn.*, 375 F. 2d 648, 657–658 (CA4 1967); *Gatling* v. *Butler*, 52 F. R. D. 389, 394–395 (Conn. 1971). Cf. *Brockington* v. *Rhodes*, 396 U. S. 41, 43 (1969).